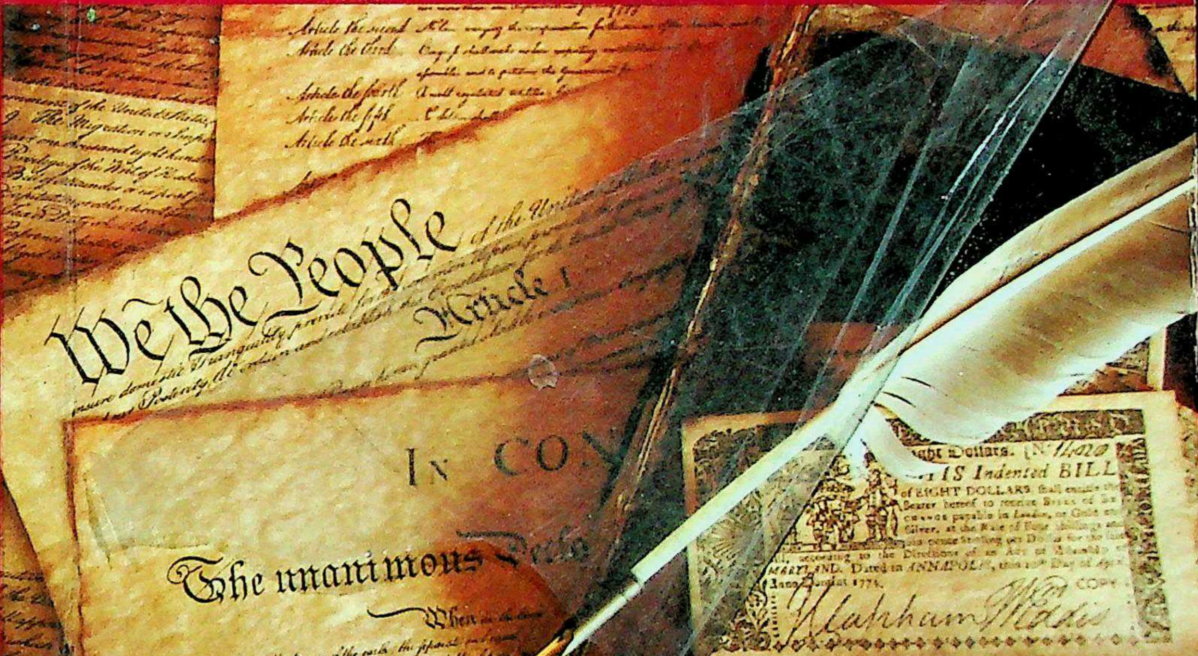
Dr. Durga Das Basu

Introduction to the Constitution of India

20th Edition 2008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(Thoroughly Revised)

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Introduction to the Constitution of India

Containing systematic and logical exposition of the Constitution of India, incorporating numerous amendments made by the Constitutional Amendments up to the 94th Constitutional Amendment Act, also updating the tables given at the end of the book providing data up to April, 2008.

by

Acharya Dr. Durga Das Basu,

M.A., LL.D. (Cal.); D. Litt. (Cal. Burd.; Rabindrabharti; Kalyani); Saraswati, Vacaspati, Vidyavaridhi, Prajnabharati, Nyayaratnakara, Neetibhaskara, Nyayabharati, Manava Ratna. Honorary Professor, Banaras Hindu University; Retired Judge, High Court, Calcutta; Formerly Member, Union Law Commission; Tagore Law Professor, Asutosh Memorial; Lecturer, Calcutta University; Recipient, National Award, Padmabhushan (1985); National Research Professor of India (1986); National Citizen's Award (1991); Honorary Fellow, Asiatic Society, Calcutta (1994)

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(Thoroughly Revised)

by

V.R. Manohar, Former Advocate-General of Maharashtra, Senior Advocate Supreme Court of India, Ex-Dean, Faculty of Law, Nagpur University, Ex-Chairman, Bar Council of Maharashtra

Hon'ble Mr. Justice Bhagabati Prosad Banerjee

Judge (Retired) High Court, Calcutta

Dr. Shakeel Ahmad Khan

M.A. (Eng. & Pol. Sc.) M.Ed., LL.M., P.G. Diploma in Criminology (Lucknow)

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यदा यदा हि धर्मस्य ग्लानिर्भवति भारत।
अभ्युत्थानमधर्मस्य तदात्मानं सृजाम्यहम्।।
परित्राणाय साधूनां विनाशाय च दुष्कृताम्।
धर्मसंस्थापनार्थाय सम्भवामि युगे युगे।।

—**श्रीमद्भगवत्गीता (IV. 7/8)**

Whenever there is
Decline of righteousness,
And rise of unrighteousness,
I incarnate myself
To protect the virtuous
And to destroy the wicked,
From Age to Age.

—*Geeta (IV. 7/8)*

preface
to the twentieth edition

The much awaited twentieth edition, thoroughly revised and updated in almost all respects, to cater the needs of the readers, is in their hands. Ours being the largest democracy of the world, it is need of the time that the enormous community of the young citizens be fully conversant with its Constitution and the working of its governmental machinery, this edition will fully meet their needs with latest authentic information. Very useful not only to the students of Law and Political Science, but also to the aspirant competitors for jobs as well as to administrators and the citizens at large, this book is unique.

This edition has updated almost all the Tables, appended to it respecting the country's population, general elections, Annual Budget, Constitutional Amendments, Fundamental Rights and Duties, Directives, the three wings of the government—the legislature, the executive and the judiciary, besides the text of the book.

24th August 2008 **Editor**
Shri Krishna Janmashtami **and the Publisher's Editorial Board**

preface to the nineteenth edition

The fact that a new revised edition has been called for within a couple of year's fulfils the hope, expressed in the preface to the previous edition, that the scope of demand for this book from general readers is almost infinite, in a population of more than 100 crores who are being more and more educated every year. The appreciation received from thousands of readers of this book and from the population at large across the country assures that the educated citizens of this biggest democracy in the world is realising that they cannot be indifferent to obtaining authentic information as to how the country is being governed, even though in their professional life, they may not have anything to do with the constitutional system. Absence of authentic information about the basic elements of the Constitution generates incorrect impression about the functions and powers of the three organs of the State—Legislature, Executive and the Judiciary and their office bearers and renders the elite of the society gullible readers of the morning newspapers even though journalists themselves cannot claim omniscience of all subject under the sky.

In the preparation and editing of the new revised edition, the editors have received valuable assistance from the Publishers' Editorial Board.

2nd April 2001
Ram Navami

Editor
and the Publishers' Editorial Board

a tribute to the great author

'UNIQUE AND VERSATILE'

Dr. Basu is a man of unique and manifold achievements, combined in one :

i) Born in February, 1910, he is actively carrying on research at the age of 87, producing creative literature, almost every quarter of the year, comprehending Jurisprudence, Political Science and Religion simultaneously.

ii) He is a legend in the world of law and his status as an 'eminent jurist' has been acknowledged by the Government of India by appointing him a full-time member of the Union Law Commission, and a Judge of the Calcutta High Court, on the category of 'eminent jurists'; by conferring upon him the National award Padmabhusan and the National Research Professorship.

iii) No other member of the Indian Judiciary has been honoured with the aforesaid awards of the Government, together with doctorates from six Universities.

iv) In the field of Constitutional Law, he has introduced the *comparative* method of research, which has been held by Lord Denning, the doyen of world Jurists, as 'a unique contribution to the jurisprudence of the world.'

v) Dr. Basu is the *pioneer* commentator of the Constitution of India (published in September, 1950) when there was no light from any judicial decision in India. His *Commentary on the Constitution of India* has brought the Indian Constitution to the door of every man in the world *who is interested in constitutional government and law.* It has celebrated its Jubilee in 1975 and its Golden Jubilee is near at sight–rare events in the lifetime of the author of any serious work.

vi) No other Indian work on Constitutional Law is read from one end of the world to the other, including non-English-speaking countries, such as Japan, Poland, Hungary, West Germany, Italy. One of Basu's books has been translated and published in Russia, where the constitutional system has no semblance to that of India.

vii) No other jurist in India has been compared with 'Blackstone, Coke and kent', by a Law Journal abroad.

viii) As an author, he is versatile and *prolific*. His contribution to jurisprudence is not confined to Constitutional Law but comprises authoritative treatises in different branches of law, the total number of pages of the current Edition of which exceeds 16,000 in Royal Octavo.

xi) Dr. Basu's talents have not been confined to writing. That he is adored by numerous Universities in India and abroad will be evidenced by the fact that he holds *honoris causa* doctorate from six Universities in India; that he has participated

Contd...

a tribute to the great author (*contd...*)

at an international seminar at the Chicago Law School; participated in a semi-Government Conference at Ottawa on the future Constitution of Canada; delivered lectures as Guest Lecturer at a score of foreign Universities in the U.K., U.S.A. and Canada.

In India, he has delivered the prestigious Tagore Law Lectures and the Ashutosh Memorial Lectures of the Calcutta University; and the Honorary Professorship Lectures of the Banaras Hindu University.

x) He holds the rare Doctorate of Law (LL.D.) of the Calcutta University and D. Lit. from as many as 6 Universities.

xi) He combines in himself all the highest Awards of the Calcutta University–LL.D., D.Lit., Tagore Law Professorship and Asutosh Memorial Lectureship.

xii) To crown all, his published research works on Sanskrit scriptures have fetched for him a number of Sanskrit titles from various cultural institutions, e.g., *Sarasvati* (Hooghly Sanskrit Parishad); *Vidavaridhi* (Anangamohan Harisabha); *Prajnabharati* (Satyananda Devayratana); *Nyayaratnakara* (Howrah Sanskrit Samaj); *Neetibhaskar* (Nikhil Banga Sanskrit Seva Samity); *Nyaya Bharati* (Sitaramdas Omkarnath Sanskrit Siksha Samsad;) *Vacaspati*,–Rashtriya Sanskrit Vidyapeetha (Tirupati).

His Bengali Book *Hindu Dharmer Saratatva*, which has run out three Editions, has been acknowledged by the Rabindra Bharati University as an original contribution to Comparative Religion, by conferring upon him *honoris causa* D. Lit. An English version of this book and Hindi and Oriya translations have been published for the use of non-Indian readers.

xiii) Apart from thus propagating the message of Indian heritage, breaking through language barriers, Dr. Basu has donated the copyright with all sale proceeds in these spiritual productions to charitable institutions.

xiv) All these multifarious activities in the cause of the nation have endeared this octogenarian to non-government public bodies such as the Citizen's Club (New Delhi), conferring upon him the National Citizen's Award; the Asiatic Society (Calcutta) by awarding its Honorary Fellowship; the Legal Aid and Advice Society, West Bengal, conferring on him the title *Acharya*; and the Bharat Sevasram Sangha, conferring on him its prestigious award *Manava Ratna*.

Other awarding plaques, medallions or souvenirs include–the Indian Association; the I.A. Federation Hall Society; the Sankara Institute of Philosophy and Culture, Academy of Comparative Religion, Kal Pratima & St. Andrews Memorial Society; Legal Aid Services, West Bengal.

—**Publishers**

CONTENTS

PART I

NATURE OF THE CONSTITUTION

1. The Historical Background 3-13

Utility of a Historical Retrospect 3
Government of India Act, 1858 3
Indian Councils Act, 1861 4
Indian Councils Act, 1892 4
Morley-Minto Reforms and the Indian Councils Act, 1909 5
Montagu-Chelmsford Report and the Government of India Act, 1919 5
Main Features of the System Introduced by the Act of 1919 6
Shortcomings of the Act of 1919 7
The Simon Commission 8
"Communal Award" 8
Main Features of the System Introduced by the Government of India Act, 1935 9
Changes Introduced by the Indian Independence Act, 1947 11

2. The Making of the Constitution 14-19

Demand for a Constitution Framed by a Constituent Assembly 14
Cripps Mission 14
Cabinet Delegation 15
H.M.G.'s Statement of December 6, 1946 15
H.M.G.'s Statement of February 20, 1947 16
And of June 3, 1947 16
The Mountbatten Plan 16
The Indian Independence Act, 1947 17
Constituent Assembly of India 18
Passing of the Constitution 18
Date of Commencement of the Constitution 19

3. The Philosophy of the Constitution 20-31

The Objectives Resolution 20
The Preamble 20
Independent and Sovereign 21
Republic 21
Sovereignty not Inconsistent with Membership of the Commonwealth 22
Promotion of International Peace 22
Democracy 23
A Representative Democracy 23
Government of the People, by the People and for the People 24
Political Justice 24
A Democratic Society 24
Economic Justice 25
Social justice 25
Liberty, equality and fraternity 25

Liberty 25
Equality 25
From a Socialistic Pattern of Society to Socialism 26
42nd Amendment, 1976 26
Need for Unity and Integrity of the Nation 27
Fraternity 27
A Secular State, Guaranteeing Freedom of Religion to all 27
42nd Amendment, 1976 27
Dignity of the Individual 28
Fundamental Duties 28

4. Outstanding Features of our Constitution 32-50

Drawn from Different Sources 32
Supplemented by Multiple Amendments, and Practically Recast by the 42nd, 43rd and 44th Amendments, 1976-78 32
The Longest Known Constitution 33
Incorporates the Accumulated Experience of Different Constitutions 33
Detailed Administrative Provisions Included 33
Peculiarity of the Problems to be Solved 34
Constitution of the Units Also Included 34
Special Provisions for Jammu & Kashmir 34
Nagaland, Sikkim, etc. 34
Federal Relations Elaborately Dealt With 35
Both Justiciable and Non-justiciable Rights Included: Fundamental Rights, Directive Principles and Fundamental Duties 35
More Flexible than Rigid 35
Legislation as Supplementing the Constitution 36
Reconciliation of a Written Constitution with Parliamentary Sovereignty 37
Role of Conventions under the Constitution 38
Fundamental Rights and Constitutional Remedies 38
Judicial Review Makes the Constitution Legalistic 39
Compromise Between Judicial Review and Parliamentary Supremacy 40
Fundamental Rights Subject to Reasonable Regulation by Legislature 42
Social Equality Also Guaranteed by the Constitution 42
Fundamental Rights Checkmated by Fundamental Duties 42
42nd Amendment, 1976 43
Universal Franchise without Communal Representation 43
Parliamentary Government Combined with an Elected President at the Head 44
42nd Amendment, 1976 44
44th Amendment, 1978 45
A Federal System with Unitary Bias 45
Integration of Indian States 45
Status of Indian States Under the British Crown 45
Incidents of Paramountcy 46
Place of Indian States in the Federal Scheme Proposed by the Government of India Act, 1935 46
Proposal of the Cabinet Mission 46
Lapse of Paramountcy under the Indian Independence Act 46
Integration and Merger 47
Reorganisation of States 47
Outstanding and 'Basic' Features of the 49
Constitution 49

5. Nature of the Federal System 51-66

India, a Union of States 51
Different Types of Federal Constitutions in the Modern World 51
Indian Constitution Basically Federal, with Unitary Features 52
Essential Features of a Federal Polity 52
Peculiar Features of Indian Federalism 53
Federation as Envisaged by the Government of India Act, 1935 54
Not the Result of a Compact 54
No State Excepting Kashmir, can Draw its Own Constitution 56
No Right to Secede 56
But Consent of a State is not Required for Altering its Boundaries by Parliament 57
No Equality of State Representation 57
Status of Sikkim 57
No Double Citizenship 58
No Division of Public Services 58
No Dual System of Courts 59
Union Control in Normal Times 59
Strong Central Bias 59
A Critique of the Federal System 60
The Working of Federalism in India 61
Indian Federalism as Judicially Interpreted 62
Survival of Federation in India 63
Sarkaria Commission 64
Conclusion 64

6. Territory of the Union 67-73

Name of the Union 67
Territory of India 67
Sikkim, a New State 68
35th Amendment 68
36th Amendment 69
Formation of New States and Alteration of Boundaries, etc. 70
Procedure for Reorganisation of States 71

7. Citizenship 74-78

Meaning of Citizenship 74
Constitutional Rights and Privileges of Citizens of India 74
Constitutional and Statutory Basis of Citizenship in India 74
  A. Persons who became Citizens on January 26, 1950 75
  B. Acquisition of Citizenship after January 26, 1950 76
Loss of Indian Citizenship 76
One Citizenship in India 76

8. Fundamental Rights and Fundamental Duties 79-150

Individual Rights and Fundamental Rights 79
The Position in England 79
Bill of Rights in the U.S.A. 79
History of the Demand for Fundamental Rights in India 80
Courts have the Power to Declare as Void Laws Contravening Fundamental Rights 80

Fundamental Rights under Indian Constitution distinguished from American Bill of Rights 81
44th Amendment, 1978. The Right to Property 81
Exceptions to Fundamental Rights 82
Fundamental Duties 82
Enumeration of Fundamental Rights in Part III, Exhaustive 83
Rights Following from other Provisions of the Constitution 83
Difference between Fundamental Rights and Rights Secured by other Provisions of Constitution 84
Amendability of Fundamental Rights; Basic Features 84
Classification of Fundamental Rights 85
Right of Property Omitted 85
Fundamental Rights—A Guarantee against State Action 87
Article 14: Equality Before the Law and Equal Protection of the Laws 87
Equality Before Law 88
Equal Protection of the Laws 89
Relation Between Arts. 14-16 92
Article 15: Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth 93
Article 16: Equality of Opportunity in Matters of Public Employment 95
The *Mandal Commission* Case 97
Relative scope of Arts. 14, 15 and 16 98
Article17: Abolition of Untouchability 98
Article 18: Abolition of Titles 99
Article 19: The Six Freedoms 101
Limitations upon the Freedoms 102
Scope for Judicial Review 104
Tests of Reasonableness of a Restriction 105
Substantive and Procedural Reasonableness 106
Freedom of the Press 106
Censorship 108
Article 20: Protection in Respect of Conviction for Offences 109
Prohibition against *ex post facto* Legislation 109
Immunity from Double Prosecution and Punishment 110
Accused's Immunity from Being Compelled to Give Evidence Against Himself 110
Article 21: Freedom of Person 111
Protection of Life and Personal Liberty 111
The *Gopalan* View 112
Maneka v. Union of India 112
Protection against Arbitrary Arrest and Detention 114
Article 22: Preventive Detention 114
Meaning of Preventive Detention 114
History of Preventive Detention of India 115
Legislative Power to Enact Preventive Detention Act 115
Article 23: Right Against Exploitation 117
Prohibition of Traffic in Human Beings and Forced Labour 118
Article 24: Prohibition of Employment of Children in Factories, etc. 118
Articles 25-28: Freedom of Conscience and Free Profession, Practice and Propagation of Religion 118
'Propagation' and Conversion 119
International Covenant 121
..... 122

Article 29 123
Article 30 123
A History of the Right to Property under the Constitution of India 126
I. The Constitution of 1949 126
II. *Amendments up to the 42nd Act, 1976* 127
The 25th Amendment 127
III. *The 42nd Amendment, 1976* 128
IV. *The 44th Amendment, 1978* 128
Vestiges of the Right to Property, and Comments Thereon 129
Article 32: Constitutional Remedies for Enforcement of Fundamental Rights 131
Special Features of the Jurisdiction of the Supreme Court Under Art. 32 132
'Prerogative Writs' 133
Difference between the Jurisdiction of the Supreme Court and the High Courts to issue writs 133
The Supreme Court as the Guardian of Fundamental Rights 133
Scope of the Writs:
I. *Habeas Corpus* 135
II. *Mandamus* 136
III. *Prohibition* 137
IV. *Certiorari* 138
V. *Quo Warranto* 139
Parliament's Power to Modify or Restrict Fundamental Rights 140
Suspension of Fundamental Rights during Proclamation of Emergency 141
The 44th Amendment, 1978 141
Exceptions to Fundamental Rights 142
Fundamental Duties 142
'Composite Culture' 142
Enforcement of Fundamental Duties 142

9. Directive Principles of State Policy 151-161

Classification of the Directive 151
Scope of the Directives 151
Nature of the Economic Democracy Envisaged 151
Socialistic Pattern of Society 151
Trends towards Collectivism 152
The 42nd Amendment 152
The 44th Amendment 152
The 86th Amendment 153
Directives Compared with Fundamental Rights 153
Non-justiciability 153
Conflict between Fundamental Rights and Directive Principles 153
Sanction Behind the Directives 154
Whether Arts. 355, 365, can be Applied to Enforce Implementation of Directives by the States 154
Utility of the Directives 155
The 42nd and 44th Amendments 156
Implementation of the Directives 157
Directives Contained in other Parts of the Constitution 159

10. Procedure for Amendment 162-172

Nature of the Amending Process 162

Procedure for Amendment 162
General Features of the Amending Procedure 163
No Joint-Session for Constitution Amending Bills 164
President Bound to give Assent 164
Is Part III or Any Other Part of the Constitution Unamendable? 165
Golak Nath 165
Keshavananda 165
Fundamental Rights Amendable 166
'Basic Features' of the Constitution Not Amendable 166
The 42nd Amendment 167
Article 368 as Interpreted by the Supreme Court 167
List of Basic Features 168
A History of Amendments of the Constitution Since 1950 168
The 42nd Amendment 168
The 43rd and 44th Amendments 169
The 73rd and 74th Amendments 170
Dangers of Frequent Amendments 170

PART II

GOVERNMENT OF THE UNION

11. The Union Executive 175-209

- **1. The President and the Vice-President** 175
  - Election of President 175
  - Qualifications for Election as President 175
  - Term of Office of President 176
  - Procedure for Impeachment of the President 176
  - Conditions of President's Office 176
  - Emoluments and Allowances of President 177
  - Vacancy in the Office of President 177
  - Election of Vice-President 178
  - Qualifications for Election as Vice-President 178
  - Whether a Member of Legislature may become President or Vice-President 178
  - Term of Office of Vice-President 178
  - Functions of the Vice-President 178
  - Emoluments 179
  - Doubts and Disputes Relating to or Connected with the Election of a President or Vice-President 179
- **2. Powers and Duties of the President** 180
  - Nature of the Powers of the President 180
  - Constitutional Limitations on President's Powers 180
  - The 42nd Amendment 180
  - The 44th Amendment 181
  - No 'Spoils System' 181
  - Veto over Union Legislation 186
  - Nature of the Veto Power 186
  - In India 187
  - Disallowance of State Legislation 189
  - Possibility of Abuse of the Ordinance making Power 191
  - The 38th Amendment 191

The 44th Amendment 191
Parliamentary Safeguard 192
Pardoning Power of President and Governor Compared 193
Rule-making Power 194

3. The Council of Ministers 196
A Body Recognised by the Constitution 196
Appointment of Ministers 196
Council of Ministers and Cabinet 196
Salaries of Ministers 197
Ministerial Responsibility to Parliament 197
Collective Responsibility 197
Individual Responsibility to President 198
Legal Responsibility 198
Special Position of the Prime Minister in the Council of Ministers 198

4. The President in relation to his Council or Ministers 200
Indian President Compared with American President and English Crown 200
Status of the President of India 201
The 42nd Amendment 201
The 43rd and 44th Amendments 202

5. The Attorney-General for India 203

6. The Comptroller and Auditor-General of India 203
Conditions of Service 204
Duties and Powers 204
Compared with His British Counterpart 205

12. The Union Legislature 210-234

Functions of Parliament 210
Constitution of Parliament 211
Composition of the Council of States 211
Composition of the House of the People 212
Territorial Constituencies for Election to the House of the People 212
Proportional Representation for Council of States 213
Why Proportional Representation Not Adopted for House of the People and Legislative Assembly 213
Duration of Houses of Parliament 214
Sessions of Parliament 214
Adjournment, Prorogation and Dissolution 214
Qualifications for Membership of Parliament 215
Disqualifications for Membership 215
Vacation of Seats by Members 216
Salaries and Allowances of Members of Parliament 216
Officers of Parliament 217
Speaker 217
Powers of the Speaker 217
Deputy Speaker 218
Chairman 218
Powers, Privileges and Immunities of Parliament and Its Members 218
Privileges Classified 219
Legislative Procedure :
I. *Ordinary Bills* 220
II. *Money Bills* 222

Money Bill and Financial Bill 223
Provisions for Removing Deadlock Between Two Houses of Parliament 224
Procedure at Joint Sitting 225
Joint Sitting cannot be Resorted to, for Passing Constitution Amending Bill 226
Financial Legislation in Parliament 226
Policy Statement in the Budget 226
Votable and Non-votable Expenditure 226
Expenditure Charged on the Consolidated Fund of India 227
Relative Parts Played by the Two Houses in Financial Legislation 227
Parliament's Control over the Financial System 228
Committee on Estimates 229
Committee on Public Accounts 229
Consolidated Fund of India 230
Public Account of India 230
Contingency Fund of India 230
Constitutional Position of the Council of States as Compared with that of the House of the People 231

PART III

GOVERNMENT OF THE STATES

13. The State Executive 237-246

1. The General Structure 237

2. Governor 237

Appointment and Term of Office of Governor 237
Why an Appointed Governor 238
Status of Appointed Governor So Far 239
Conditions of Governor's Office 240
Powers of the Governor 240

3. The Council of Ministers 241

Appointment of Council of Ministers 241
Relationship between the Governor and his Ministers 241
Discretionary Functions of Governor 242
Special Responsibilities 242
Discretion, *in practice*, in Certain Matters 243
President's Control Over the Governor 243
Whether Governor Competent to Dismiss a Chief Minister 243
Testing Majority Support 245

4. Advocate-General 245

14. The State Legislature 247-262

The Bi-cameral and Uni-cameral Legislatures 247
Creation and Abolition of Second Chambers in States 247
Composition of the Legislative Council 248
Composition of the Legislative Assembly 248
Duration of the Legislative Assembly 249
Duration of the Legislative Council 249
Qualifications for Membership of the State Legislature 249
Disqualifications for Membership 249

Legislative Procedure in a State Having Bi-cameral Legislature, as Compared with that in Parliament.......250
Legislative Council Compared with Council of States.......250
Provisions for Resolving Deadlock Between Two Houses.......251
Comparison of Procedure in Parliament and State Legislature.......251
Utility of the Second Chamber in a State.......254
Governor's Power of Veto.......255
Veto Powers of President and Governor, Compared.......256
Ordinance-making Power of Governor.......257
Ordinance-making Power of President and Governor, Compared.......258
Privileges of a State Legislature.......259
Andhra Pradesh.......260
Gujarat.......260
Kerala.......260
Maharashtra.......260
Nagaland.......260
Haryana.......260
Karnataka.......260
Himachal Pradesh.......260
Manipur and Tripura.......260
Meghalaya.......260
Sikkim.......260
Mizoram.......260
Arunachal Pradesh.......260
Goa.......261
Chhattisgarh.......261
Uttarakhand.......261
Jharkhand.......261

15. The State of Jammu & Kashmir....... 263-272

Peculiar Position of the State.......263
History of the Integration of Jammu and Kashmir with India.......263
Position of the State Under the Original Constitution of India.......263
Implications of the Accession.......264
Articles of the Constitution which Apply of Their Own Force to the State.......264
The Constitution Order of 1950.......265
Subsequent Orders.......265
Making of the State Constitution.......265
Important Provisions of the State Constitution.......267
Indira-Abdullah Agreement of 1975.......268
Recapitulation of the Constitutional Position of Jammu and Kashmir *vis-a-vis* the Union.......269

PART IV

ADMINISTRATION OF UNION TERRITORIES

16. Administration of Union Territories and Acquired Territories....... 275-277

Genesis of Union Territories.......275
Union Territories.......275

Administrator 276
Provision for Legislative Assembly and Council of Ministers 276
Legislative Power 276
President's Power to Make Regulations as Regards the Andaman & Nicobar Islands; *Lakshadweep* and other Islands 277
High Courts for Union Territories 277
Acquired Territories 277

PART V

LOCAL GOVERNMENT

17. The New System of Panchayats and Municipalities 281-282
History 281
The 73rd and 74th Constitution Amendment Acts 281
Special Features of the New System 282

18. Panchayats 283-285
3-tier System 283
Composition 283
Reservation of Seats for Scheduled Castes and Scheduled Tribes 283
Reservation for Women 283
Reservation of Offices of Chairpersons 283
Duration of Panchayat 284
Qualification for Membership 284
Powers, Authority and Responsibilities of Panchayats 284
Powers to Impose Taxes and Financial Resources 284
Panchayat Finance Commissions 284
State Election Commission 285
Bar to Interference by Courts in Electoral Matters 285

19. Municipalities and Planning Committees 286-289
Composition of Municipalities 286
Wards Committee 286
Other Committees 287
Reservations of Seats for Scheduled Castes and Scheduled Tribes 287
Reservation for Women 287
Reservation of Offices of Chairpersons 287
Duration of Municipalities 287
Qualification for Membership 287
Powers, Authority and Responsibilities of Municipalities 287
Power to Impose Taxes and Financial Resources 288
Panchayat Finance Commission 288
Elections to Municipalities 288
Bar to Interference by Courts in Electoral Matters 288
Committees for (a) District Planning and (b) Metropolitan Planning 288
Addition to the Duties of the Finance Commission under Art. 280 289

PART VI

ADMINISTRATION OF SPECIAL AREAS

20. Administration of Scheduled and Tribal Areas 293-295

Scheduled Areas 293
Tribal Areas 293
Administration of Scheduled Areas in States *other than Assam, Meghalaya, Tripura and Mizoram* 293
Tribal Areas in Assam, Meghalaya, Tripura and Mizoram 294

PART VII

THE JUDICATURE

21. Organisation of the Judiciary in General.................. 299-300

No Federal Distribution of Judicial Powers 299
The Hierarchy of Courts..299

22. The Supreme Court..301-313

Constitution of the Supreme Court 301
Appointment of Judges 301
Qualifications for Appointment as Judge..302
Tenure of Judges 303
Impeachment of a Judge 303
Salaries, etc. 303
Independence of Supreme Court Judges, How Secured 303
Position of the Supreme Court under the Constitution..304
Compared with the American Supreme Court..304
  (i) As a Federal Court 305
  (ii) As a Court of Appeal..305
  (iii) As a Guardian of the Constitution..306
A. Original Jurisdiction of Supreme Court..306
B. Writ Jurisdiction 307
C. Appellate Jurisdiction of Supreme Court..308
  (i) Criminal..308
  (ii) Appeal by Special Leave 309
D. Advisory Jurisdiction..310
E. Miscellaneous Jurisdiction..311
The 42nd, 43rd and 44th Amendments 311

23. The High Court 314-323

The High Court of a State 314
Constitution of High Courts 314
Appointment and Conditions of the Office of a Judge of a High Court......314
Participatory and Consultative Process 314
Salaries, etc. 316
Qualifications for Appointment as High Court Judge 316
Independence of the Judges..316
Control of the Union over High Courts..316
Transfer..317
Territorial Jurisdiction of a High Court..318
Ordinary Jurisdiction of High Courts 318
  (a) Original..319
  (b) Appellate..319
High Court's Power of Superintendence 319
Jurisdiction over Administrative Tribunals..320

The Writ Jurisdiction of Supreme Court and High Court 321
Public Interest litigation 321
Control over Subordinate Courts 322
The 42nd, 43rd and 44th Amendments 322

PART VIII

THE FEDERAL SYSTEM

24. Distribution of Legislative and Executive Powers 327-334
Nature of the Union 327
The Scheme of Distribution of Legislative Powers 327
Territorial Extent of Union and State Legislation 328
Limitations to the Territorial Jurisdiction of Parliament 328
Distribution of Legislative Subjects 329
Residuary Powers 329
Expansion of the Legislative Powers of the Union under Different Circumstances 330
Interpretation of the Legislative Lists 331
Distribution of Executive Powers 331

25. Distribution of Financial Powers 335-343
Need for Distribution of Financial Resources 335
Principles Underlying Distribution of Tax Revenues 336
Distribution of Legislative Powers to Levy Taxes 336
  (a) Professions Tax 336
  (b) Sales Tax 336
  (c) Tax on Consumption or Sale of Electricity 337
  (d) Exemption of Union and State Properties from Mutual Taxation 337
Distribution of Proceeds of Taxes 337
Distribution of Non-tax Revenues 339
Grants-in-Aid 339
Constitution and Functions of the Finance Commission 339
The First Finance Commission 340
The Second Finance Commission 340
The Third Finance Commission 340
The Fourth Finance Commission 340
The Fifth Finance Commission 340
The Sixth Finance Commission 340
The Seventh Finance Commission 341
The Eighth Finance Commission 341
The Ninth Finance Commission 341
The Tenth Finance Commission 341
The Eleventh Finance Commission 341
The Twelth Finance Commission 341
The Thirteenth Finance Commission 341
Safeguarding the Interests of the States in the Shared Taxes 341
Financial Control by the Union in Emergencies 342
Borrowing Powers of the Union and the States 342
Demand for More Financial Power by States 343

26. Administrative Relations between the Union and the States 344-351

Need for Co-ordination between the Units of the Federation 344
Directions by the Union to State Governments 345
Sanction for Enforcement of Directions 345
Delegation of Functions 345
All-India Services 346
Grant-in-Aid 346
Inter-State Council 346
Inter-State Commerce Commission 347
Extra-constitutional Agencies for Settling All-India Problems 347
Planning Commission 347
National Development Council 348
National Integration Council 349
Mutual Delegation of Functions 350
Need for Mutual Immunity for Proper Working of Federal System 350
Immunity of Union Property from State Taxation 350
Exemption of Property and Income of a State from Union Taxation 350

27. Inter-State Relations 352-356

Inter-State Comity 352
Full Faith and Credit 352
Prevention and Settlement of Disputes 352
Inter-State Councils 353
Zonal Councils 353
River Board 354
Water Disputes Tribunal 354
Need for the Freedom of Trade and Commerce 355
Freedoms under Arts. 19(1)(g) and 301 356

28. Emergency Provisions 357-367

Different Kinds of Emergencies 357
42nd and 44th Amendments 357
    A. Proclamation of Emergency 358
How a Proclamation may Terminate 358
Effects of Proclamation of Emergency 359
Uses of the Emergency Powers 360
Internal Disturbance No More Ground of Emergency 361
    B. Proclamation of Failure of Constitutional Machinery in a State 361
Conditions for Extension of Duration beyond One Year 362
Judicial Review 362
Articles 352 and 356 Compared 363
Use of the Power 363
Frequent and Improper Use of the Power under Art. 356, Deprecated 364
Power under Art. 356 must be Used Rarely 364
President Not to Take Irreversible Steps under Art. 356(1)(a), (b) and (c) 364
Court's Power to Restore *status quo ante* 364
Illustration of Cases where Resort to Art. 356 would Not be Proper 365
Proper Occasions for Use Suggested 365

Effect of 44th Amendment on Art. 356 366
Proclamation of Financial Emergency 366

PART IX

MISCELLANEOUS

29. Rights and Liabilities of the Government and Public Servants 371-378
Property of the Union and the States 371
Power to Carry on Trade 372
Power to Borrow Money 372
Formalities for Government Contracts 372
Suability of the Union and a State 373
Suability of Heads of State 375
Immunity of President or Governor for Official Acts 376
Position of Ministers 376
Personal Acts during Term of Office 377
Suability of Public Officials 377

30. The Services and Public Service Commissions 379-394
Position of Civil Servants in a Parliamentary System of Government 379
Matters which Call for Regulation 380
Power to Prescribe Conditions of Service 380
Tenure of Office 381
Service at Pleasure 381
Cannot be Fettered by Contract 381
Limitations upon Exercise of the Pleasure 382
Exceptions in the Case of some High Officials 382
Safeguards for Civil Servants 382
In which Cases the Opportunity Must be Given 383
What Constitutes Dismissal, Removal and Reduction in Rank 383
Exceptions to the Requirement of Giving Opportunity 385
Article 323A of the Constitution and the Administrative Tribunals Act, 1985 385
Public Service Commissions for the Union and the States 386
Appointment and Term of Office of Members 386
Independence of the Commission 387
Prohibition As to the Holding of Offices by Members of Commission on Ceasing to be Such Members 387
Functions of Public Service Commissions 388
Report of Public Service Commissions 390
How, Far Commission's Advice Binding on the Government 390
All-India Services 391
Fundamental Rights of Civil Servants 392

31. Elections 395-397
Elections 395
Power of Legislature 395
Single-member Territorial Constituencies 395
Decision of Disputes Relating to Election of Members 396
The 42nd Amendment—Setting up Election Tribunals 396

Special Jurisdiction for Election Disputes re. President, Vice-President, Prime Minister, Speaker....396
Election Commission....396

32. Minorities, Scheduled Castes and Scheduled Tribes 398-406

Provisions for Protection of Minorities....398
Religious Freedom....399
Linguistic and Cultural Rights Guaranteed....399
Facilities for Instruction in Mother-tongue....400
Special Officer for Linguistic Minorities....400
No Discrimination in State Educational Institutions....400
Right to Establish Educational Institutions of their Choice....401
No Discrimination in State Aid to Educational Institutions....401
No Discrimination in Public Employment....402
Provisions for Upliftment of the Scheduled Castes and Tribes, and other Backward Classes....402
Scheduled Castes and Tribes....402
  A. Special Provisions for Scheduled Castes and Tribes....403
  B. For Backward Classes, Generally....404
Special Provisions for the Anglo-Indian Community....405

33. Languages.... 407-414

Need for an Official Language....407
Official Language....407
  A. *Of the Union*....408
Official Language Commission....408
Implementation of the Recommendations of the First Official Language Commission....408
Two Standing Commissions....409
  B. *Of Inter-State Communications*....410
  C. *Of a State*....410
  D. *Language to be Used in the Supreme Court and in the High Courts and for Acts, Bills, etc.*....410
Authorised Translations (Central Laws) Act, 1973....411
Article 394A....411
Official Langauges Act, 1963....411
Special Directives Relating to Languages....412
Sanskrit Neglected....413
Violation of Arts. 27, 351....413

34. How the Constitution Has Worked.... 415-446

Multiple Amendments of the Constitution....415
Vital Changes Made by the 42nd to 44th Amendments....416
A Case for Revision of the Constitution, instead of Piecemeal Amendments....416
To Codify :
  A. Conventions....417
  B. Privileges of Legislatures....417
Implementation of the Directive Principles....418
Trend Towards the Unitary System....419
Separatist Forces at Work....420
The Sikhs....420

The Assamese 421
The Problem of Infiltration from Bangladesh 422
Language as a Separatist Force 423
Financial Inadequacy in States 424
Judicial Review 424
A Case for Revision of the Constitution 425
The Role of the Judiciary Under Our Constitution 425
Novel Trends in Judicial Review : Judicial activism 426
Dangerous Anti-National Trends in Minority Demands 426
Claim of Hindu Converts to Other Religions 430
No Minority Problem in India, in the International Sense 431
Disrespect for the Motherland 433
Lack of National Sentiment 434
Failure of Parliamentary Democracy 436
The New Generation of Young Voters 436
Controversy as to the True Meaning of 'Secularism' 437
Unstable Government and Rule by a Party Lacking Majority 438
Resort to Presidential System, No Solution 438

TABLES 447-494

TABLE I : Facts to Start With 447
TABLE II : Statewise Membership of the Constituent Assembly of India as on 31st December, 1947 448
TABLE III : Territory of India 449
TABLE IV : The Constitution Amendment Acts 451
TABLE V : Fundamental Rights 466
TABLE VI : Directive Principles of State Policy 467
TABLE VII : Fundamental Duties of Citizens 468
TABLE VIII : Government of the Union 469
TABLE IX : Offices of President and Vice-President Compared 470
TABLE X : A. Presidents of India 471
B. Vice-Presidents of India 471
C. Prime Ministers of India 472
TABLE XI : Representation of States and Union Territories in the Council of States (Rajya Sabha) (as in December, 2000) 473
TABLE XII : Allocation of Seats in the House of People 474
TABLE XIII : Lok Sabha and Its Speaker(s) 475
TABLE XIV : Government of States 476
TABLE XV : Membership of Legislative Assemblies and Legislative Councils (as in December, 2000) 477
TABLE XVI : The Judiciary 478
TABLE XVII : Jurisdiction and Seats of High Courts 479
TABLE XVIII : Territorial Jurisdiction of Benches of Central Administrative Tribunal 480
TABLE XIX : Distribution of Legislative Power 481
TABLE XX : Languages [Arts. 344(1), 351, 8th Sch.] 491
TABLE XXI : President's Rule in States and Union Territories 492

INDEX 495-509

PART I

Nature of the Constitution

CHAPTER 1

THE HISTORICAL BACKGROUND

Utility of a Historical Retrospect.

THE very fact that the Constitution of the Indian Republic is the product not of a political revolution but of the research and deliberations of a body of eminent representatives of the people who sought to improve upon the existing system of administration, makes a retrospect of the constitutional development indispensable for a proper understanding of this Constitution.

Practically the only respect in which the Constitution of 1949[1] differs from the constitutional documents of the preceding two centuries is that while the latter had been imposed by an imperial power, the Republican Constitution was made by the people themselves, through representatives assembled in a sovereign Constituent Assembly. That explains the majesty and ethical value of this new instrument and also the significance of those of its provisions which have been engrafted upon the pre-existing system.

Government of India Act, 1858.

For our present purposes we need not go beyond the year 1858 when the British Crown assumed sovereignty over India from the East India Company, and Parliament enacted the first statute for the governance of India under the direct rule of the British Government,—the Government of India Act, 1858 (21 & 22 Vict., c. 106). This Act serves as the starting point of our survey because it was dominated by the principle of absolute imperial control without any popular participation in the administration of the country, while the subsequent history up to the making of the Constitution is one of gradual relaxation of imperial control and the evolution of responsible government. By this Act, the powers of the Crown were to be exercised by the Secretary of State for India, assisted by a Council of fifteen members (known as the Council of India). The Council was composed exclusively of people from England, some of whom were nominees of the Crown while others were the representatives of the Directors of the East India Co. The Secretary of State, who was responsible to the British Parliament, governed India through the Governor-General, assisted by an Executive Council, which consisted of high officials of the Government.

The essential features of the system[2] introduced by the Act of 1858 were—

(a) The administration of the country was not only unitary but rigidly centralised. Though the territory was divided into Provinces with a Governor or Lieutenant-Governor aided by his Executive Council at the head of each of them, the Provincial Governments were mere agents of the Government of India and had to function under the superintendence, direction and control of the Governor-General in all matters relating to the government of the Province.[2]

(b) There was no separation of functions, and all the authority for the governance of India,—civil and military, executive and legislative,—was vested in the Governor-General in Council who was responsible to the Secretary of State.[2]

(c) The control of the Secretary of State over the Indian administration was absolute. The Act vested in him the 'superintendence, direction and control of all acts, operations and concerns which in any way related to the Government or revenues of India'. Subject to his ultimate responsibility to the British Parliament, he wielded the Indian administration through the Governor-General as his agent and his was the last word, whether in matters of policy or of details.[3]

(d) The entire machinery of administration was bureaucratic, totally unconcerned about public opinion in India.

Indian Councils Act, 1861.

The Indian Councils Act of 1861 introduced a grain of popular element insofar as it provided that the Governor-General's Executive Council, which was so long composed exclusively of officials, should include certain additional *non-official* members, while transacting legislative business as a Legislative Council. But this Legislative Council was neither representative nor deliberative in any sense. The members were nominated and their functions were confined exclusively to a consideration of the legislative proposals placed before it by the Governor-General. It could not, in any manner, criticise the acts of the administration or the conduct of the authorities. Even in legislation, effective powers were reserved to the Governor-General, such as—(a) giving prior sanction to Bills relating to certain matters, without which they could not be introduced in the Legislative Council; (b) vetoing the Bills after they were passed or reserving them for consideration of the Crown; (c) legislating by Ordinances which were to have the same authority as Acts made by the Legislative Council.

Similar provisions were made by the Act of 1861 for Legislative Councils in the Provinces. But even for initiating legislation in these Provincial Councils with respect to many matters, the prior sanction of the Governor-General was necessary.

Indian Councils Act, 1892.

Two improvements upon the preceding state of affairs as regards the Indian and Provincial Legislative Councils were introduced by the Indian Councils Act, 1892, namely that (a) though the majority of official members were retained, the non-official members of the Indian Legislative Council were henceforth to be nominated by the Bengal Chamber of Commerce and the Provincial Legislative Councils, while the non-official members of the Provincial Councils were to be nominated by certain local bodies such as universities, district boards, municipalities; (b) the Councils were to have the power of discussing the annual statement of revenue and expenditure, *i.e.*, the Budget and of addressing questions to the Executive.

This Act is notable for its object, which was explained by the Under-Secretary of State for India thus:

> "to widen the basis and expand the functions of the Government of India, and to give further opportunities to the *non-official and native elements* in Indian society to take part in the work of the Government."

Morley-Minto reforms and the Indian Councils Act, 1909.

The first attempt at introducing a representative and popular element was made by the Morley-Minto Reforms, known by the names of the then Secretary of State for India (Lord MORLEY) and the Viceroy (Lord MINTO), which were implemented by the Indian Councils Act, 1909.

The changes relating to the Provincial Legislative Councils were, of course, more advanced. The size of these Councils was enlarged by including elected non-official members so that the official majority was gone. An element of election was also introduced in the Legislative Council at the Centre but the official majority there was maintained.

The deliberative functions of the Legislative Councils were also increased by this Act by giving them the opportunity of influencing the policy of the administration by moving resolutions on the Budget, and on any matter of public interest, save certain specified subjects, such as the Armed Forces, Foreign Affairs and the Indian States.

On the other hand, the positive vice of the system of election introduced by the Act of 1909 was that it provided, for the first time, for separate representation of the Muslim community and thus sowed the seeds of separatism[4] that eventually led to the lamentable partition of the country. It can hardly be overlooked that this idea of separate electorates for the Muslims was synchronous with the formation of the Muslim League as a political party (1906[5]).

Subsequent to this, the Government of India Act, 1915 (5 & 6 Geo. V., c. 61) was passed merely to consolidate all the preceding Government of India Acts so that the existing provisions relating to the government of India in its executive, legislative and judicial branches could be had from one enactment.

Montagu-Chelmsford Report and the Government of India Act, 1919.

The next landmark in constitutional development of India is the Montagu-Chelmsford Report which led to the enactment of the Government of India Act, 1919. It was, in fact, an amending Act, but the amendments introduced substantive changes into the existing system.

The Morley-Minto Reforms failed to satisfy the aspirations of the nationalists in India inasmuch as, professedly, the Reforms did not aim at the establishment of a Parliamentary system of government in the country and provide for the retention of the final decision on all questions in the hands of the irresponsible Executive.

The Indian National Congress which, established in 1885, was so long under the control of Moderates, became more active during the First World War and started its campaign for self-government (known as the 'Home Rule' movement). In response to this popular demand, the British

Government made a declaration on August 20, 1917, that the policy of His Majesty's Government was that of—

> "Increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to progressive realisation of responsible government in British India as an integral part of the British Empire."

The then Secretary of State for India (Mr. E.S. Montagu) and the Governor-General (Lord CHELMSFORD), entrusted with the task of formulating proposals for carrying out the above policy and the Government of India Act, 1919, gave a legal shape to their recommendations.

Main Features of the System introduced by the Act of 1919.

The main features of the system introduced by the Government of India Act, 1919, were as follows[6]:

I. *Dyarchy in the Provinces.* Responsible government in the Provinces was sought to be introduced, without impairing the responsibility of the Governor (through the Governor-General), for the administration of the Province, by resorting to device known as 'Dyarchy' or dual government. The subjects of administration were to be divided (by Rules made under the Act) into two categories—Central and Provincial. The Central subjects were those which were exclusively kept under the control of the Central Government. The Provincial subjects were sub-divided into 'transferred' and 'reserved' subjects.

Of the matters assigned to the Provinces, the 'transferred subjects' were to be administered by the Governor with the aid of Ministers responsible to the Legislative Council in which the proportion of elected members was raised to 70 per cent. The foundation of responsible government was thus laid down in the narrow sphere of 'transferred' subjects.

The 'reserved subjects', on the other hand, were to be administered by the Governor and his Executive Council without any responsibility to the Legislature.

II. *Relaxation of Central control over the Provinces.* As stated already, the Rules made under the Government of India Act, 1919, known as the Devolution Rules, made a separation of the subjects of administration into two categories—Central and Provincial. Broadly speaking, subjects of all-India importance were brought under the category 'Central', while matters primarily relating to the administration of the provinces were classified as 'Provincial'. This meant a relaxation of the previous Central control over the provinces not only in administrative but also in legislative and financial matters. Even the sources of revenue were divided into two categories so that the Provinces could run the administration with the aid of revenue raised by the Provinces themselves and for this purpose, the provincial budgets were separated from the Government of India and the Provincial Legislature was empowered to present its own budget and levy its own taxes relating to the provincial sources of revenue.

At the same time, this devolution of power to the Provinces should not be mistaken for a *federal* distribution of powers. Under the Act of 1919, the

Provinces got power by way of delegation from the Centre. The Central Legislature, therefore, retained power to legislate for the whole of India, relating to any subject, and it was subject to such paramount power of the Central Legislature that the Provincial Legislature got the power "to make laws for the peace and good government of the territories for the time being constituting that province".

The control of the Governor-General over Provincial legislation was also retained by a laying down that a Provincial Bill, even though assented to by the Governor, would not become law unless assented to also by the Governor-General, and by empowering the Governor to reserve a Bill for the consideration of the Governor-General if it related to matters specified in this behalf by the Rules made under the Act.

III. *The Indian Legislature made more representative.* No responsibility was, however, introduced at the Centre and the Governor-General in Council continued to remain responsible only to the British Parliament through the Secretary of State for India. Nevertheless, the Indian Legislature was made more representative and, for the first time, *bi-cameral.* It was to consist of an Upper House, named the Council of State, composed of 60 members of whom 34 were elected, and a Lower House, named the Legislative Assembly, composed of about 144 members of whom 104 were elected. The powers of both the Houses were equal except that the power to vote supply was given exclusively to the Legislative Assembly. The electorates were, however, arranged on a communal and sectional basis, developing the Morley-Minto device further.

The Governor-General's overriding powers in respect of Central legislation were retained in the following forms—(i) his prior sanction was required to introduce Bills relating to certain matters; (ii) he had the power to veto or reserve for consideration of the Crown any Bill passed by the Indian Legislature; (iii) he had the converse power of certifying any Bill or any grant refused to be passed or made by the Legislature, in which case it would have the same effect as if it was passed or made by the Legislature; (iv) he could make Ordinances, having the force of law for a temporary period, in case of emergency.

Shortcomings of the Act of 1919

The Reforms of 1919, however, failed to fulfil the aspiration of the people in India, and led to an agitation by the Congress (then under the leadership of Mahatma Gandhi) for 'Swaraj' or 'self-government', independent of the British Empire, to be attained through 'Non-cooperation'. The shortcomings of the 1919 system, mainly, were—

(i) Notwithstanding a substantial measure of devolution of power to the Provinces the structure still remained unitary and centralised "with the Governor-General in Council as the keystone of the whole constitutional edifice; and it is through the Governor-General in Council that the Secretary of State and, ultimately, Parliament discharged their responsibilities for the peace, order and good government of India".[7] It was the Governor-General and not the Courts who had the authority to decide whether a particular subject was Central or Provincial. The Provincial Legislature could not without the previous sanction of the Governor-General, take up for consideration any bill relating to a number of subjects.

(ii) The greatest dissatisfaction came from the working of Dyarchy in the Provincial sphere. In a large measure, the Governor came to dominate ministerial policy by means of his overriding financial powers and control over the official block in the Legislature. In practice, scarcely any question of importance could arise without affecting one or more of the reserved departments. The impracticability of a division of the administration into two water-tight compartments was manifested beyond doubt. The main defect of the system from the Indian standpoint was the control of the purse. Finance being a reserved subject, was placed in charge of a member of the Executive Council and not a Minister. It was impossible for any Minister to implement any progressive measure for want of funds and together with this was the further fact that the members of the Indian Civil Service, through whom the Ministers were to implement their policies, were recruited by the Secretary of State and were responsible to him and not to the Ministers. Above all was the overriding power of the Governor who did not act as a constitutional head even with respect to the transferred subjects. There was no provision for collective responsibility of the Ministers to the Provincial Legislature. The Ministers were appointed individually, acted as advisers of the Governor, and differed from members of the Executive Council only in the fact that they were non-officials. The Governor had the discretion to act otherwise than in accordance with the advice of his Ministers; he could certify a grant refused by the Legislature or a Bill rejected by it if it was regarded by him as essential for the due discharge of his responsibilities relating to a reserved subject.

It is no wonder, therefore, that the introduction of ministerial government over a part of the Provincial sphere proved ineffective and failed to satisfy Indian aspirations.

The Simon Commission.

The persistent demand for further reforms, attended with the dislocation caused by the Non-cooperation movement, led the British Government in 1927 to appoint a Statutory Commission, as envisaged by the Government of India Act, 1919 itself (s. 84A), to inquire into and report on the working of the Act and in 1929 to announce that Dominion Status was the goal of Indian political developments. The Commission, headed by Sir John Simon, reported in 1930.

The Report was considered by a Round Table Conference consisting of the delegates of the British Government and of British India as well as of the Rulers of the Indian States (inasmuch as the scheme was to unite the Indian States with the rest of India under a federal scheme). A White Paper, prepared on the results of this Conference, was examined by a Joint Select Committee of the British Parliament and the Government of India Bill was drafted in accordance with the recommendations of that Select Committee, and passed, with certain amendments, as the Government of India Act, 1935.

"Communal Award."

Before analysing the main features of the system introduced by this Act, it should be pointed out that this Act went another step forward in perpetuating the communal cleavage between the Muslim and the non-Muslim communities, by prescribing separate electorates on the basis of the 'Communal Award' which was issued by Mr. Ramsay MacDonald, the British Prime Minister, on August 4, 1932, on the ground that the two major communities had failed to come to an agreement. From now onwards, the agreement between the two *religious* communities was continuously hoisted as a condition precedent for any further *political* advance. The Act of 1935, it should be noted, provided separate representation not only for the Muslims, but also for the Sikhs, the Europeans, Indian Christians and Anglo-Indians and thus created a serious hurdle in the way of the building up of national unity, which the makers of the future Constitution found it almost insurmountable to overcome even after the Muslims had partitioned for a separate State.

The main features of the governmental system prescribed by the Act of 1935 were as follows—

Main features of the system introduced by the Government of India Act, 1935.

(a) *Federation and Provincial Autonomy.* While under all the previous Government of India Acts, the government of India was unitary, the Act of 1935 prescribed a federation, taking the Provinces and the Indian States as units. But it was optional for the Indian States to join the Federation; and since the Rulers of the Indian States never gave their consent, the Federation envisaged by the Act of 1935 never came into being.

But though the Part relating to the Federation never took effect, the Part relating to Provincial Autonomy was given effect to since April, 1937. The Act divided legislative powers between the Provincial and Central Legislatures, and within its defined sphere, the Provinces were no longer delegates of the Central Government, but were autonomous units of administration. To this extent, the Government of India assumed the role of a federal government *vis-a-vis* the Provincial Government, though the Indian States did not come into the fold to complete the scheme of federation.

The executive authority of a Province was also exercised by a Governor on behalf of the Crown and not as a subordinate of the Governor-General. The Governor was required to act with the advice of Ministers responsible to the Legislature.

But notwithstanding the introduction of Provincial Autonomy, the Act of 1935 retained control of the Central Government over the Provinces in a certain sphere—by requiring the Governor to act 'in his discretion' or in the exercise of his 'individual judgment' in certain matters. In such matters, the Governor was to act without ministerial advice and under the control and directions of the Governor-General, and, through him, of the Secretary of State.

(b) *Dyarchy at the Centre.* The executive authority of the Centre was vested in the Governor-General (on behalf of the Crown), whose functions were divided into two groups—

(i) The administration of defence, external affairs, ecclesiastical affairs, and of tribal areas, was to be made by the Governor-General in his discretion with the help of 'counsellors', appointed by him, who were not responsible to the Legislature, (ii) With regard to matters other than the above reserved subjects, the Governor-General was to act on the advice of a 'Council of Ministers' who were responsible to the Legislature. But even in regard to this latter sphere, the Governor-General might act contrary to the advice so tendered by the ministers if any of his 'special responsibilities' was involved. As regards the special responsibilities, the Governor-General was to act under the control and directions of the Secretary of State.

But, in fact, neither any 'Counsellors' nor any Council of Ministers responsible to the Legislature came to be appointed under the Act of 1935; *the old Executive Council provided by the Act of 1919 continued to advise the Governor-General* until the Indian Independence Act, 1947.

(c) *The Legislature.* The Central Legislature was bi-cameral, consisting of the Federal Assembly and the Council of State.

In six of the Provinces, the Legislature was bi-cameral, comprising a Legislative Assembly and a Legislative Council. In the rest of the Provinces, the Legislature was uni-cameral.

The legislative powers of both the Central and Provincial Legislatures were subject to various limitations and neither could be said to have possessed the features of a sovereign Legislature. Thus, the Central Legislature was subject to the following limitations:

(i) Apart from the Governor-General's power of veto, a Bill passed by the Central Legislature was also subject to veto by the Crown.

(ii) The Governor-General might prevent discussion in the Legislature and suspend the proceedings in regard to any Bill if he was satisfied that it would affect the discharge of his special responsibilities.

(iii) Apart from the power to promulgate Ordinances during the recess of the Legislature, the Governor-General had independent powers of legislation, concurrently with those of the Legislature. Thus, he had the power to make temporary Ordinances as well as permanent Acts at any time for the discharge of his special responsibilities.

(iv) No bill or amendment could be introduced in the Legislature without the Governor-General's previous sanction, with respect to certain matters, *e.g.*, if the Bill or amendment sought to repeal or amend or was repugnant to any law of the British Parliament extending to India or any Governor-General's or Governor's Act, or if it sought to affect matters as respects which the Governor-General was required to act in his discretion.

There were similar fetters on the Provincial Legislature.

The Instruments of Instructions issued under the Act further required that Bills relating to a number of subjects, such as those derogating from the powers of a High Court or affecting the Permanent Settlement, when presented to the Governor-General or a Governor for his assent, were to be reserved for the consideration of the Crown or the Governor-General, as the case might be.

(d) *Distribution of legislative powers between the Centre and the Provinces.* Though the Indian States did not join the Federation, the federal provisions of the Government of India Act, 1935, were in fact applied as *between the Central Government and the Provinces.*

The division of legislative powers, between the Centre and the Provinces is of special interest to the reader in view of the fact that the division made in the Constitution between the Union and the States proceeds largely on the same lines. It was not a mere delegation of power by the Centre to the Provinces as by Rules made under the Government of India Act, 1919. As already pointed out, the Government of India Act of 1935 itself divided the legislative powers between the Central and Provincial Legislatures and, subject to the provisions mentioned below, neither Legislature could transgress the powers assigned to the other.

A three-fold division was made in the Act—

(i) There was a Federal List over which the Federal Legislature had exclusive powers of legislation. This List included matters such as External affairs; Currency and coinage; Naval, military and air forces; census, (ii) There was a Provincial List of matters over which the Provincial Legislature had exclusive jurisdiction, *e.g.*, Police, Provincial Public Service, Education. (iii) There was a Concurrent List of matters over which both the Federal and Provincial Legislature had competence, *e.g.*, Criminal law and procedure, Civil procedure, Marriage and divorce, Arbitration.

The Federal Legislature had the power to legislate with respect to matters enumerated in the Provincial List if a Proclamation of Emergency was made by the Governor-General. The Federal Legislature could also legislate with respect to a Provincial subject if the Legislatures of two or more Provinces desired this in their common interest.

In case of repugnancy in the Concurrent field, a Federal law prevailed over a Provincial law to the extent of the repugnancy, but if the Provincial law having been reserved for the consideration of the Governor-General received his assent, the Provincial law prevailed, notwithstanding such repugnancy.

The allocation of residuary power of legislation in the Act was unique. It was not vested in either the Central or the Provincial Legislature but the Governor-General was empowered to authorise either the Federal or the Provincial Legislature to enact a law with respect to any matter which was not enumerated in the Legislative Lists.

It is to be noted that 'Dominion Status', which was promised by the Simon Commission in 1929, was not conferred by the Government of India Act, 1935.

Changes introduced by the Indian Independence Act, 1947.

The circumstances leading to the enactment of the Indian Independence Act, 1947,[8] will be explained in the next Chapter. But the changes introduced by this Act into the structure of government pending the drawing up of a Constitution for independent India by Constituent Assembly, should be pointed out in the present context, so as to offer a correct and comprehensive picture of the background against which the Constitution was made.

In pursuance of the Indian Independence Act, the Government of India Act, 1935, was amended by the Adaptation Orders, both in India and Pakistan, in order to provide an interim Constitution to each of the two Dominions until the Constituent Assembly could draw up the future Constitution.

The following were the main results of such adaptations:—

(a) *Abolition of the Sovereignty and Responsibility of the British Parliament.* As has been already explained, by the Government of India Act, 1858, the Government of India was transferred from the East India Company to the Crown. By this Act, the British Parliament became the direct guardian of India, and the office of the Secretary of State for India was created for the administration of Indian affairs,—for which the Secretary of State was to be responsible to Parliament. Notwithstanding gradual relaxation of the control, the Governor-General of India and the Provincial Governors remained substantially under the direct control of the Secretary of State until the Indian Independence Act, 1947, so that—

> "in constitutional theory, the Government of India is a subordinate official Government under His Majesty's Government."

The Indian Independence Act altered this constitutional position, root and branch. It declared that with effect from the 15th August, 1947 (referred to as the 'appointed day'), India ceased to be a Dependency and the suzerainty of the British Crown over the Indian States and the treaty relations with Tribal Areas also lapsed from the date.

The responsibility of the British Government and Parliament for administration of India having ceased, the office of the Secretary of State for India was abolished.

(b) *The Crown no longer the source of authority.* So long as India remained a Dependency of the British Crown, the Government of India was carried on in the name of His Majesty. Under the Act of 1935, the Crown came into further prominence owing to the scheme of the Act being federal, and all the units of the federation, including the Provinces, drew their authority direct from the Crown. But under the Independence Act, 1947, neither of the two Dominions of India and Pakistan derived its authority from the British Isles.

(c) *The Governor-General and Provincial Governors to act as constitutional heads.* The Governors-General of the two Dominions became the constitutional heads of the two new Dominions as in the case of the other Dominions. This was, in fact, a necessary corollary from 'Dominion Status' which had been denied to India by the Government of India Act, 1935, but conceded by the Indian Independence Act, 1947.

According to the adaptations under the Independence Act, there was no longer any Executive Council as under the Act of 1919 or 'counsellors' as envisaged by the Act of 1935. The Governor-General or the Provincial Governor was to act on the advice of a Council of Ministers having the confidence of the Dominion Legislature or the Provincial Legislature, as the case might be. The words "in his discretion", "acting in his discretion" and "individual judgment" were effaced from the Government of India Act, 1935, wherever they occurred, with the result that there was now no sphere in which these constitutional heads could act without or against the wishes of the Ministers. Similarly, the powers of the Governor-General to require Governors to discharge certain functions as his agents were deleted from the Act.

The Governor-General and the Governors lost extraordinary powers of legislation so as to compete with the Legislature, by passing Acts, Proclamations and Ordinances for ordinary legislative purposes, and also the power of certification. The Governor's power to suspend the Provincial Constitution was taken away. The Crown also lost its right of veto and so the Governor-General could not reserve any bill for the signification of His Majesty's pleasure.

(d) *Sovereignty of the Dominion Legislature.* The Central Legislature of India, composed of the Legislative Assembly and the Council of States, ceased to exist on August 14, 1947. From the 'appointed day' and until the Constituent Assemblies of the two Dominions were able to frame their new Constitutions and new Legislatures were constituted thereunder,—it was the Constituent Assembly itself, which was to function also as the Central Legislature of the Dominion to which it belonged. In other words, the Constituent Assembly of either Dominion (until it itself desired otherwise), was to have a dual function, *constituent* as well as *legislative*.

The sovereignty of the Dominion Legislature was complete and no sanction of the Governor-General would henceforth be required to legislate on any matter, and there was to be no repugnancy by reason of contravention of any Imperial law.

REFERENCES

1. The Constitution of India was adopted on 26-11-1949 and some of its provisions were given immediate effect. The bulk of the Constitution, however, became operative on 26-1-1950, which date is referred to in the Constitution as its 'Date of Commencement', and is celebrated in India as the "*Republic Day*".
2. Report of the Indian Statutory Commission (Simon Report), Vol. I, pp. 112 *et seq.*
3. SETON, *India Office,* p. 81.
4. PANIKKAR, *Asia and Western Dominance,* 1953, p. 155.
5. NEHRU, *Discovery of India,* 1956, p. 385.
6. Simon Report, Vol. I, pp. 122-26, 148-56.
7. Report of the Joint Parliamentary Committee; Simon Report, Vol. I, pp. 232-38.
8. For the text of the Government of India Acts, 1800-1935, the Indian Councils Acts, 1861-1909, the Indian Independence Act, 1947 and Orders thereunder, see BASU, *Constitutional Documents,* Vol. I (1969).

CHAPTER 2

THE MAKING OF THE CONSTITUTION

Demand for a Constitution framed by a Constituent Assembly

THE demand that India's political destiny should be determined by the Indians themselves had been put forward by Mahatma Gandhi as early as in 1922.

> "Swaraj will not be a free gift of the British Parliament; it will be a declaration of India's full self-expression. That it will be expressed through an Act of Parliament is true but it will be merely a courteous ratification of the *declared wish of the people of India even* as it was in the case of the Union of South Africa."

The failure of the Statutory Commission and the Round Table Conference which led to the enactment of the Government of India Act, 1935, to satisfy Indian aspirations accentuated the demand for a Constitution made by the people of India without outside interference, which was officially asserted by the National Congress in 1935. In 1938, Pandit Nehru definitely formulated his demand for a Constituent Assembly thus:

> "The National Congress stands for independence and democratic state. It has proposed that the constitution of free India must be framed, without outside interference, by a Constituent Assembly elected on the basis of adult franchise."

This was reiterated by the Working Committee of the Congress in 1939.

Cripps Mission

This demand was, however, resisted by the British Government until the outbreak of World War II when external circumstances forced them to realise the urgency of solving the Indian constitutional problem. In 1940, the Coalition Government in England recognised the principle that Indians should themselves frame a new Constitution for autonomous India, and in March 1942, when the Japanese were at the doors of India, they sent Sir Stafford Cripps, a member of the Cabinet, with a draft declaration on the proposals of the British Government which were to be adopted (at the end of the War) provided the two major political parties (Congress and the Muslim League)[1] could come to an agreement to accept them, *viz.*:—

(a) that the Constitution of India was to be framed by an elected Constituent Assembly of the Indian people;

(b) that the Constitution should give India Dominion Status,—equal partnership of the British Commonwealth of Nations;

(c) that there should be one Indian Union comprising all the Provinces and Indian States; but

(d) that any province (or Indian State) which was not prepared to accept the Constitution would be free to retain its constitutional position existing at that time and with such non-acceding Provinces the British Government could enter into separate constitutional arrangements.

But the two parties failed to come to an agreement to accept the proposals, and the Muslim League urged—

(a) that India should be divided into two autonomous States on communal lines, and that some of the Provinces, earmarked by Mr. Jinnah, should form an independent Muslim State, to be known as Pakistan;

(b) that instead of one Constituent Assembly, there should be two Constituent Assemblies, *i.e.*, a separate Constituent Assembly for building Pakistan.

Cabinet Delegation.

After the rejection of the Cripps proposals (followed by the dynamic 'Quit India' campaign launched by the Congress), various attempts to reconcile the two parties were made including the Simla Conference held at the instance of the Governor-General, Lord WAVELL. These having failed, the British Cabinet sent three of its own members[2] including Cripps himself, to make another serious attempt. But the Cabinet Delegation, too, failed in making the two major parties come to any agreement and were, accordingly, obliged to put forward their own proposals, which were announced simultaneously in India and in England on the 16th May, 1946.

The proposals of the Cabinet Delegation sought to effect a compromise between a Union of India and its division. While the Cabinet Delegation definitely rejected the claim for a separate Constituent Assembly and a separate State for the Muslims, the scheme which they recommended involved a virtual acceptance of the principle underlying the claim of the Muslim League.

The broad features of the scheme were—

(a) There would be a Union of India, comprising both British India and the States, and having jurisdiction over the subjects of Foreign Affairs, Defence and Communications. All residuary powers would belong to the Provinces and the States.

(b) The Union would have an Executive and a Legislature consisting of representatives of the Provinces and States. But any question raising a major communal issue in the Legislature would require for its decision a majority of the representatives of the two major communities present and voting as well as a majority of all the members present and voting.

The Provinces would be free to form Groups with executives and legislatures, and each Group would be competent to determine the provincial subjects which would be taken up by the Group organisation.

H.M.G.'s statement of December 6, 1946

The scheme laid down by the Cabinet Mission was, however, recommendatory, and it was contemplated by the Mission that it would be adopted by agreement between the two major parties. A curious situation, however, arose after an election for forming the Constituent Assembly was held. The Muslim League joined the election and its candidates were returned. But a difference of opinion had in the meantime arisen between the Congress and the League regarding the interpretation of the

'Grouping clauses' of the proposals of the Cabinet Mission. The British Government intervened at this stage, and explained to the leaders in London that they upheld the contention of the League as correct, and on December 6, 1946, the British Government published the following statement—

> "Should a constitution come to be framed by the Constituent Assembly in which a large section of the Indian population had not been represented. His Majesty's Government would not contemplate forcing such a constitution upon any unwilling part of the country."

For the first time, thus, the British Government acknowledged the possibility of two Constituent Assemblies and two States. The result was that on December 9, 1946, when the Constituent Assembly first met, the Muslim League members did not attend, and the Constituent Assembly began to function with the non-Muslim League members.

H.M.G.'s statement of February 20, 1947.

The Muslim League next urged for the dissolution of the Constituent Assembly of India on the ground that it was not full representative of all sections of the people of India. On the other hand, the British Government, by their Statement of the 20th February, 1947, declared,—

(a) that British rule in India would in any case end by June, 1948, after which the British would certainly transfer authority to Indian hands;

(b) that if by that time a fully representative Constituent Assembly failed to work out a constitution in accordance with the proposals made by the Cabinet Delegation,—

> "H.M.G. will have to consider to whom the powers of the Central Government in British India should be handed over, on the due date, whether as a whole to some form of Central Government for British India, or in some areas to the existing Provincial Government, or in such other way as seems most reasonable and in the best interests of the Indian people."

The result was inevitable and the League did not consider it necessary to join this Assembly, and went on pressing for another Constituent Assembly for 'Muslim India'.

The British Government next sent Lord MOUNTBATTEN to India as the Governor-General, in place of Lord WAVELL, in order to expedite the preparations for the transfer of power, for which they had fixed a rigid time limit. Lord MOUNTBATTEN brought the Congress and the League into a definite agreement that the two 'problem' provinces of the Punjab and Bengal would be partitioned so as to form absolute Hindu and Muslim majority blocks within these Provinces. The League would then get its Pakistan—which the Cabinet Mission had so ruthlessly denied it,—minus Assam, East Punjab and West Bengal, while the Congress which was taken as the representative of the people of India other than the Muslims would get the rest of India where the Muslims were in minority.

and of June 3, 1947.

The Mountbatten Plan.

The actual decisions as to whether the two Provinces of the Punjab and Bengal were to be partitioned was, however, left to the vote of the members of the Legislative Assemblies of these two Provinces, meeting in two parts, according to a plan known as the 'Mountbatten Plan'. It was given a formal shape by a Statement, made by the British Government of June 3, 1947, which provided, *inter alia*, that:

> "The Provincial Legislative Assemblies of Bengal and the Punjab (excluding European members) will, therefore, each be asked to meet in two parts, one representing the Muslim majority districts and the other the rest of the Province.... The members of the two parts of each Legislative Assembly sitting separately will be empowered to vote whether or not the Province should be partitioned. If a simple majority of *either* Part decides in favour of Partition, division will take place and arrangements will be made accordingly. If partition were decided upon, each part of the Legislative Assembly would decide, on behalf of the areas it represented, whether it would join the existing or a new and separate Constituent Assembly."

It was also proposed that there would be a referendum in the North Western Frontier Province and in the Muslim majority district of Sylhet as to whether they would join India or Pakistan. The Statement further declared H.M.G.'s intention "to introduce legislation during the current session for the transfer of power this year on a Dominion Status basis to one or two successor authorities according to decisions taken as a result of the announcement."

The result of the vote according to the above Plan was a foregone conclusion as the representatives of the Muslim majority areas of the two Provinces (*i.e.*, West Punjab and East Bengal) voted for partition and for joining a new Constituent Assembly. The referendum in the North Western Frontier and Sylhet was in favour of Pakistan.

On the 26th July, 1947, the Governor-General announced the setting up of a separate Constituent Assembly for Pakistan. The Plan of June 3, 1947, having been carried out, nothing stood in the way of effecting the transfer of power by enacting a statute of the British Parliament in accordance with the declaration.

The Indian Independence Act, 1947.

It must be said to the credit of the British Parliament that it lost no time to draft the Indian Independence Bill upon the basis of the above Plan, and this Bill was passed and placed on the Statute Book, with amazing speed, as the Indian Independence Act, 1947 (10 & 11 Geo. VI, c. 30). The Bill, which was introduced in Parliament on July 4, received the Royal Assent on July 18, 1947, and came into force from that date.

The most outstanding characteristics of the Indian Independence Act was that while other Acts of Parliament relating to the Government of India (such as the Government of India Acts from 1858 to 1935) sought to lay down a Constitution for the governance of India by the legislative will of the British Parliament,—this Act of 1947 did not lay down any such constitution. The Act provided that as from the 15th August, 1947 (which date is referred to in the Act as the 'appointed date'), in place of 'India' as defined in the Government of India Act, 1935, there would be set up two independent Dominions, to be known as *India* and *Pakistan*, and the Constituent Assembly of each Dominion was to have unlimited power to frame and adopt any constitution and to repeal any Act of the British Parliament, including the Indian Independence Act.

Under the Act, the Dominion of India got the residuary territory of India excluding the Provinces of Sind, Baluchistan, West Punjab, East Bengal, and the North Western Frontier Province and the district of Sylhet in Assam (which had voted in favour of Pakistan at a referendum, before the Act came into force).

Constituent Assembly of India. The Constituent Assembly, which had been elected for undivided India and held its first sitting on the 9th December, 1946, reassembled on the 14th August, 1947, as the sovereign Constituent Assembly for the Dominion of India.

As to its composition, it should be remembered, that it had been elected by indirect election by the members of the Provincial Legislative Assemblies (Lower House only), according to the scheme recommended by the Cabinet Delegation [see Table II, in the Appendix]. The essentials of this scheme were as follows:—

(1) Each province and each Indian State or group of States were allotted the total number of seats proportional to their respective populations roughly in the ratio of one to a million. As a result, the Provinces were to elect 292 members while the Indian States were allotted a minimum of 93 seats.

(2) The seats in each province were distributed among the three main communities, Muslim, Sikh and General, in proportion to their respective populations.

(3) Members of each community in the Provincial Legislative Assembly elected their own representatives by the method of proportional representation with single transferable vote.

(4) The method of selection in the case of representatives of Indian States was to be determined by consultation.

As a result of the Partition under the Plan of June 3, 1947, a separate Constituent Assembly was set up for Pakistan, as stated earlier. The representatives of Bengal, Punjab, Sind, North Western Frontier Province, Baluchistan and the Sylhet district of Assam (which had joined Pakistan by a referendum) ceased to be members of the Constituent Assembly of India, and there was a fresh election in the new Provinces of West Bengal and East Punjab. In the result, when the Constituent Assembly reassembled on the 31st October, 1947, the membership of the House was reduced to 299, as in Table II, *post*. Of these, 284 were actually present on the 26th November, 1949, and appended their signatures to the Constitution as finally passed.

The salient principles of the proposed Constitution had been outlined by various committees of the Assembly[3] such as the Union Constitution Committee, the Union Powers Committee, Committee on Fundamental Rights, and, after a general discussion of the reports of these Committees, the Assembly appointed a Drafting Committee on the 29th August, 1947. The Drafting Committee, under the Chairmanship of Dr. Ambedkar, embodied the decision of the Assembly with alternative and additional proposals in the form of a 'Draft Constitution of India' which was published in February, 1948. The Constituent Assembly next met in November, 1948, to consider the provisions of the Draft, clause by clause. After several session the consideration of the clauses or second reading was completed by the 17th October, 1949.

Passing of the Constitution. The Constituent Assembly again sat on the 14th November, 1949, for the third reading and finished it on the 26th November, 1949, on which date the Constitution received the signature of the President of the Assembly and was declared as passed.

Date of Commencement of the Constitution.

The provisions relating to citizenship, elections, provisional Parliament, temporary and transitional provisions, were given immediate effect, *i.e.*, from November 26, 1949. The rest of the Constitution came into force on the 26th January, 1950, and this date is referred to in the Constitution as the *Date of its Commencement.*[4]

REFERENCES

1. As stated earlier, the Muslim League, professedly a communal party, was formed in 1906. While its earlier objective was to secure separate representation of the Muslims in the political system, in its Lahore Resolution of 1940, it asserted its demand for the creation of a separate Muslim State in the Muslim majority areas. This idea was developed into the claim for dividing India into two independent States, when the Cripps offer was announced.
2. The Cabinet Mission consisted of Lord PETHICK-LAWRENCE, Sir Stafford Cripps and Mr. A.V. Alexander.
3. The important committees of the Constituent Assembly were,—

   (a) Union Powers Committee. It had 9 members. Shri Jawaharlal Nehru was its chairman. (b) Committee on Fundamental Rights and Minorities. It had 54 members. Sardar Vallabhbhai Patel was its chairman, (c) Steering Committee. It had 3 members. Dr. K.M. Munshi (chairman), Shri Gopalswamy Ayyangar and Shri Bishwanath Das. (d) Provincial Constitution Committee. 25 members. Sardar Patel as chairman. (e) Committee on Union Constitution. 15 members. Pt. Nehru as chairman.

   The draft was prepared by Sir B.N. Rau, Adviser to the Constituent Assembly. A 7-member committee chaired by Sir Alladi Krishnaswamy Iyer was set up to examine the draft. Dr. B.R. Ambedkar who was minister for law from 15-8-1947 to 26-1-1950 piloted the draft constitution in the Assembly.
4. Since that date, the Constitution has been freely amended, according to the procedure laid down in Art. 368,—no less than 94 times, by 2006 (see Table IV, *post*). For a text of the original Constitution, with its subsequent amendments, see Author's *Constitution Amendment Acts; Constitutional Law of India,* 6th Ed. (Prentice-Hall of India).

CHAPTER 3

THE PHILOSOPHY OF THE CONSTITUTION

EVERY Constitution has a philosophy of its own.

The Objectives Resolution.

For the philosophy underlying *our* Constitution we must look back into the historic Objectives Resolution of Pandit Nehru which was adopted by the Constituent Assembly on January 22, 1947,[1] and which inspired the shaping of the Constitution through all its subsequent stages. It reads thus—

> "This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution:
>
> (2) WHEREIN the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India, shall be a Union of them all; and
>
> (3) WHEREIN the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the constitution, shall possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of Government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom; and
>
> (4) WHEREIN all power and authority of the Sovereign Independent India, its constituent parts and organs of Governments are derived from the people; and
>
> (5) WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and
>
> (6) WHEREIN adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and
>
> (7) WHEREIN shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to justice and the law of civilised nations; and
>
> (8) The ancient land attain its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind."

In the words of Pandit Nehru, the aforesaid Resolution was "something more than a resolution. It is a declaration, a firm resolve, a pledge, an undertaking and for all of us a dedication".

The Preamble.

It will be seen that the ideal embodied in the above Resolution is faithfully reflected in the Preamble to the Constitution, which, as amended in 1976,[2] summarises the aims and objects of the Constitution :

> "WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN *SOCIALIST SECULAR*[2] DEMOCRATIC REPUBLIC and to secure to all its citizens:
>
> JUSTICE, social, economic and political;
>
> LIBERTY of thought, expression, belief, faith and worship;
>
> EQUALITY of status and of opportunity; and to promote among them all;
>
> FRATERNITY assuring the dignity of the individual and the unity *and integrity*[2] of the Nation:
>
> IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

The importance and utility of the Preamble has been pointed out in several decisions of *our* Supreme Court. Though, by itself, it is not enforceable in a Court of law,[3] the Preamble to a written Constitution states the *objects* which the Constitution seeks to establish and promote and also aids the legal interpretation of the Constitution where the language is found to be *ambiguous.*[4] For a proper appreciation of the aims and aspirations embodied in our Constitution, therefore, we must turn to the various expressions contained in the Preamble, as reproduced above.

The Preamble to our Constitution serves, two purposes:

(a) it indicates the *source* from which the Constitution derives its authority;

(b) it also states the *objects* which the Constitution seeks to establish and promote.

Independent and Sovereign

As has been already explained, the Constitution of India, unlike the preceding Government of India Acts, is not a gift of the British Parliament. It is ordained by the people of India through their representatives assembled in a sovereign Constituent Assembly which was competent to determine the political future of the country in any manner it liked. The words—'We, the people of India.... adopt, enact and give to ourselves this Constitution', thus, declare the ultimate sovereignty of the people of India and that the Constitution rests on their authority.[3]

Sovereignty means the independent authority of a State. It means that it has the power to legislate on any subject; and that it is not subject to the control of any other State or external power.

Republic.

The Preamble declares, therefore, in unequivocal terms that the source of all authority under the Constitution is the people of India and that there is no subordination to any external authority. While Pakistan remained a British Dominion until 1956, India ceased to be a Dominion and declared herself a 'Republic' since the making of the Constitution in 1949. It means a government by the people and for the people.

We have an elected President at the head of our State, and all office including that of the President will be open to all citizens.

Sovereignty not inconsistent with membership of the Commonwealth.

On and from the 26th Jan., 1950, when the Constitution came into force, the Crown of England ceased to have any legal or constitutional authority over India and no citizen of India was to have any allegiance to the British Crown. But though India declared herself a Republic, she did not sever all ties with the British Commonwealth as did *Eire,* by enacting the Republic of Ireland Act, 1948. In fact, the conception of the Commonwealth itself has undergone a change owing to India's decision to adhere to the Commonwealth, *without acknowledging allegiance to the Crown* which was the symbol of unity of the Old British Empire and also of its successor, the 'British Commonwealth of Nations'.[5] It is this decision of India which has converted the 'British Commonwealth',—a relic of imperialism,—into a free association of independent nations under the honourable name of the 'Commonwealth of Nations'. This historic decision took place at the Prime Ministers' Conference at London on April 27, 1949, where, our Prime Minister, Pandit Nehru, declared that notwithstanding her becoming a sovereign independent Republic, India will continue—"her full membership of the Commonwealth of Nations and her acceptance of the King as the symbol of the *free* association of the independent nations and as such the Head of the Commonwealth."

It is to be noted that this declaration is *extra-legal* and there is no mention of it in the Constitution of India. It is a voluntary declaration and indicates a free association and no obligation. It only expresses the desire of India not to sever her friendly relations with the English people even though the tie of political subjugation was severed. The new association was an honourable association between independent States. It accepts the Crown of England only as a *symbolic* head of the Commonwealth (having no functions to discharge in relation to India as belonged to him prior to the Constitution), and having no claim to the allegiance of the citizens of India. Even if the King or Queen of England visits India, he or she will *not* be entitled to any precedence over the President of India. Again though as a member of the Commonwealth, India has a right to be represented on Commonwealth conferences, decisions at Commonwealth conferences will not be binding on her and no treaty with a foreign power or declaration of war by any member of the Commonwealth will be binding on her, without her express consent. Hence, this voluntary association of India with the Commonwealth does not affect her sovereignty to any extent and it would be open to India to cut off that association at any time she finds it not to be honourable or useful. As Pandit Nehru explained—

> "It is an agreement by free will, to be terminated by free will."[6]

Promotion of International Peace.

The great magnanimity with which India took this decision in the face of a powerful opposition at home which was the natural reaction of the manifold grievances under the imperialistic rule, and the great fortitude with which the association has still been maintained, under the pressure of repeated disappointments, the strain of baffling international alignments and the 1976 upsurge of racialism in England, speak volumes about the sincerity of India's pledge to contribute 'to the promotion of world peace' which is reiterated in Art. 51 of the Constitution:

> "The State shall endeavour to—
> (a) promote international peace and security;
> (b) maintain just and honourable relations between nations;
> (c) foster respect for international law and treaty obligations in the dealings of organised people with one another ; and
> (d) encourage settlement of international disputes by arbitration."

The fraternity which is professed in the Preamble is thus not confined within the bounds of the national territory; it is ready to overflow them to reach the loftier ideal of universal brotherhood; which can hardly be better expressed than in the memorable words of Pandit Nehru:

> "The only possible, real object that we, in common with other nations, can have is the object of co-operating in building up some kind of a world structure, call it one world, call it what you like."[7]

Thus, though India declares her sovereignty to manage her own affairs, in no unmistakable terms, the Constitution does not support isolationism or 'Jingoism'. Indian sovereignty is consistent with the concept of 'one world', international peace and amity.

Democracy.

The picture of a 'democratic republic' which the Preamble envisages is democratic not only from the *political* but also from the *social* standpoint; in other words, it envisages not only a democratic form of government but also a democratic society, infused with the spirit of 'justice, liberty, equality and fraternity'.

A Representative Democracy.

(a) As a form of government, the democracy which is envisaged is, of course, a representative democracy and there are in *our* Constitution no agencies of direct control by the people, such as 'referendum, or 'initiative'. The people of India are to exercise their sovereignty through a Parliament at the Centre and a Legislature in each State, which is to be elected on adult franchise[8] and to which the real Executive, namely, the Council of Ministers, shall be responsible. Though there shall be an elected President at the head of the Union and a Governor nominated by the President at the head of each State, neither of them can exercise any political function without the advice of the Council of Ministers[9] which is collectively responsible to the people's representatives in the respective Legislatures (excepting functions which the Governor is authorised by the Constitution itself to discharge in his discretion or on his individual responsibility). The Constitution holds out equality to all the citizens in the matters of choice of their representatives, who are to run the governmental machinery.

Also known as parliamentary democracy, it envisages (i) representation of the people, (ii) responsible government, and (iii) accountability of the Council of Ministers to the legislature. The essence of this is to draw a direct line of authority from the people through the legislature. The character and content of parliamentary democracy in the ultimate analysis depends upon the quality of persons who man the legislature as representatives of the people. The members of the legislature, thus, must owe their power directly or indirectly to the people.[10]

Government of the People, by the People and for the People.

Political Justice.

The ideal of a democratic republic enshrined in the Preamble of the Constitution can be best explained with reference to the adoption of universal suffrage (which has already been explained) and the complete equality between the sexes not only before the law but also in the political sphere. Political Justice means the absence of any arbitrary distinction between man and man in the political sphere. In order to ensure the 'political' justice held out by the Preamble, it was essential that every person in the territory of India, irrespective of his proprietary or educational qualifications, should be allowed to participate in the political system like any other person. Universal adult suffrage was adopted with this object in view. This means that every five years, the members of the Legislatures of the Union and of each State shall be elected by the vote of the entire adult population, according to the principle—'one man, one vote'.

(b) The offering of equal opportunity to men and women, irrespective of their caste and creed, in the matter of public employment also implements this democratic ideal. The treatment of the minority, even apart from the constitutional safeguards, clearly brings out that the philosophy underlying the Constitution has not been overlooked by those in power. The fact that members of the Muslim and Christian communities are as a rule being included in the Council of Ministers of the Union as well as the States, in the Supreme Court, and even in Diplomatic Missions, without any constitutional reservation in that behalf, amply demonstrates that those who are working the Constitution have not missed its true spirit, namely, that every citizen must feel that this country is his own.

A Democratic Society.

That this democratic Republic stands for the good of *all* the people is embodied in the concept of a 'Welfare State' which inspires the Directive Principles of State Policy. The 'economic justice' assured by the Preamble can hardly be achieved if the democracy envisaged by the Constitution were confined to a 'political democracy'. In the words of Pandit Nehru:[11]

> "Democracy has been spoken of chiefly in the past, as political democracy, roughly represented by every person having a vote. But a vote by itself does not represent very much to a person who is down and out, to a person, let us say, who is starving or hungry. Political democracy, by itself, is not enough except that it may be used to obtain a gradually increasing measure of economic democracy, equality and the spread of good things of life to others and removal of gross inequalities."[11]

Or, as Dr. Radhakrishnan has put it—

> "Poor people who wander about, find no work, no wages and starve, whose lives are a continual round of sore affliction and pinching poverty, cannot be proud of the Constitution or its law."[12]

In short, the Indian Constitution promises not only *political* but also *social* democracy, as explained by Dr. Ambedkar in his concluding speech in the Constituent Assembly:

> "Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity which are not to be treated as separate items in a trinity.

> They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. *Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity.*"

The State in a democratic society derives its strength from the cooperative and dispassionate will of all its free and equal citizens.[13] Social and economic democracy is the foundation on which political democracy would be a way of life in the Indian polity[14].

Economic Justice.

(c) The banishment of poverty, not by expropriation of those who *have*, but by the multiplication of the national wealth and resources and an equitable distribution thereof amongst all who contribute towards its production, is the aim of the State envisaged by the Directive Principles. Economic democracy will be installed in our sub-continent to the extent that this goal is reached. In short, economic justice aims at establishing economic democracy and a 'Welfare State'.

The ideal of economic justice is to make equality of status meaningful and life worth living at its best removing inequality of opportunity and of status—social, economic and political.[15]

Social justice.

Social justice is a fundamental right.[16] Social justice is the comprehensive form to remove social imbalance by law harmonising the rival claims or the interests of different groups and/or sections in the social structure or individuals by means of which alone it would be possible to build up a welfare State.[17]

Liberty, equality and fraternity.

The three have to be secured and protected with social justice and economic empowerment and political justice to all the citizens under the rule of law.[18]

Liberty.

Democracy, in any sense, cannot be established unless certain minimal rights, which are essential for a free and civilised existence, are assured to every member of the community. The Preamble mentions these essential individual rights as 'freedom of thought, expression, belief, faith and worship' and these are guaranteed against all the authorities of the State by Part III of the Constitution [*vide Arts.* 19, 25-28], subject, of course, to the implementation of the Directive Principles, for the common good [*Art.* 31C] and the 'fundamental duties', introduced [*Art.* 51A], by the 42nd Amendment, 1976.

'Liberty' should be coupled with social restraint and subordinated to the liberty of the greatest number for common happiness.[19]

Equality.

Guaranteeing of certain rights to each individual would be meaningless unless all inequality is banished from the social structure and each individual is assured of equality of status and opportunity for the development of the best in him and the means for the enforcement of the rights guaranteed to him. This object is secured in the body of the Constitution, by making illegal all discriminations by the State between citizen and citizen, simply on the ground of religion, race, caste, sex or place of birth [*Art.* 15]; by throwing open 'public places' to all citizens

[*Art.* 15(2)]; by abolishing untouchability [*Art.* 17]; by abolishing titles of honour [*Art.* 18]; by offering equality of opportunity in matters relating to employment under the State [*Art.* 16]; by guaranteeing equality before the law and equal protection of the laws, as justiciable rights [*Art.* 14].

In addition to the above provisions to ensure *civic* equality the Constitution seeks to achieve *political* equality by providing for universal adult franchise [*Art. 326*] and by reiterating that no person shall be either excluded from the general electoral roll or allowed to be included in any general or special electoral roll, only on the ground of his religion, race, caste or sex [*Art.* 325].

Apart from these general provisions, there are special provisions in the Directive Principles [Part IV] which enjoin the State to place the two sexes on an equal footing in the economic sphere, by securing to men and women equal right to work and equal pay for equal work [*Art.* 39, *Cls.* (a), (d)].

From a Socialistic Pattern of Society to Socialism.

The realisation of so many objectives would certainly mean an expansion of the functions of the State. The goal envisaged by the Constitution, therefore, is that of a 'Welfare State'[20] and the establishment of a 'socialist state'[2]. At the Avadi session in 1955, Congress explained this objective as establishing a 'socialistic pattern of society' by a resolution—

> "In order to realise the object of Congress. . . . and to *further the objectives stated in the Preamble and Directive Principles of State Policy* of the Constitution of India, planning should take place with a view to the establishment of a *socialistic pattern of society,* where the principal means of production are under social ownership or control, production is progressively speeded up and there is equitable distribution of the national wealth."

How far this end has been already achieved will be explained in Chap. 9, where it will also be pointed out how, till 1992, the trend had been from a 'socialistic pattern' towards a 'socialistic state', bringing industries and private enterprises under State ownership and management and carrying on trade and business as a State function.

42nd Amendment, 1976.

That the goal of the Indian polity is *socialism* was ensured by inserting the word 'socialist' in the Preamble, by the Constitution (42nd Amendment) Act, 1976. It has been inserted "to spell out expressly the high ideals of socialism". It is to be noted, however, that the 'socialism' envisaged by the Indian Constitution is not the usual scheme of State socialism which involves 'nationalisation' of *all* means of production, and the abolition of private property. As the then Prime Minister Indira Gandhi explained[21]—

> "We have always said that we have our *own brand* of socialism. We will nationalise the sectors where we feel the necessity. Just nationalisation is not our type of socialism."[21]

Though the word 'Socialism' is vague, our Supreme Court has observed that its principal aim is to eliminate inequality of income and status and standards of life, and to provide a decent standard of life to the working people. The Indian Constitution, therefore, does not seek to abolish private property altogether but seeks to put it under restraints so that it may be used in the interests of the nation, which includes the uplift of the poor.

Instead of a total nationalisation of all property and industry, it envisages a 'mixed economy', but aims at offering 'equal opportunity' to all, and the abolition of 'vested interests'.[22-23] From 1992 onwards the trend is now away from socialism to privatisation. Investment in many public enterprises has been divested in favour of private persons and many industries and services which were reserved for the government sector have been thrown open for private enterprise. This is in keeping with the worldwide trend after the collapse of socialism in the U.S.S.R., and East European countries. But the constitutional obligation to pay compensation to the private owner for State acquisition has been taken away by repealing Art. 31, by the Constitution (44th Amendment) Act, 1978, as will be further explained under Chap. 8, *post*.

Need for Unity and Integrity of the Nation.

Unity amongst the inhabitants of this vast sub-continent, torn asunder by a multitude of problems and fissiparous forces, was the first requisite for maintaining the independence of the country as well as to make the experiment of democracy successful. The ideal of unity has been buttressed by adding the words 'and integrity' of the Nation, in the Preamble, by the Constitution (42nd Amendment) Act, 1976. But neither the integration of the people nor a democratic political system could be ensured without infusing a spirit of brotherhood amongst the heterogeneous population, belonging to different races, religions and cultures.[24]

The 'Fraternity' cherished by the framers of the Constitution will be achieved not only by abolishing untouchability amongst the different sects of the same community, but by abolishing all communal or sectional or even local or provincial anti-social feelings which stand in the way of the unity of India.

Fraternity.

Democracy would indeed be hollow if it fails to generate this spirit of brotherhood amongst all sections of the people,—a feeling that they are all children of the same soil, the same Motherland. It becomes all the more essential in a country like India, composed of so many races, religions, languages and cultures.

Article 1 of the Declaration of, Human Rights (1948), adopted by the United Nations, says:

> "All human beings are born free and equal in *dignity* and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brother-hood."

It is this spirit of brotherhood that the Preamble of *our* Constitution reflects.[25]

A Secular State, guaranteeing Freedom of Religion to all.

42nd Amendment, 1976.

The unity and fraternity of the people of India, professing numerous Faiths, has been sought to be achieved by enshrining the ideal of a 'secular State', which means that the State protects all religions equally and does not itself uphold any religion as the State religion. The question of Secularism is not one of sentiments, but one of law. The secular objective of the State has been specifically expressed by inserting the word 'secular' in the Preamble by the Constitution (42nd Amendment) Act, 1976. Secularism is a part of the basic structure of the Constitution.[25] There is no provision in the Constitution making any religion the 'established Church' as some other Constitutions do. On the other hand, the liberty of 'belief, faith and worship' promised in the Preamble is implemented by incorporating the fundamental rights of all citizens relating to 'freedom of religion' in Arts. 25-28, which guarantee to each individual freedom to profess, practise and propagate religion, assure strict impartiality on the part of the State and its institutions towards all religions (see Chap. 8, *post*).

This itself is one of the glowing achievements of Indian democracy when her neighbours, such as Pakistan,[26] Bangladesh, Sri Lanka (Ceylon) and Burma, uphold particular religions as State religions.

[For further discussion on 'Secularism', see under Chap. 8, *Art.* 25, *post.*]

Dignity of the Individual.

A fraternity cannot, however, be installed unless the dignity of each of its members is maintained. The Preamble, therefore, says that the State, in India, will assure the dignity of the Individual. The Constitution seeks to achieve this object by guaranteeing equal fundamental rights to each individual, so that he can enforce his minimal rights, if invaded by anybody, in a court of law. Seeing that these justiciable rights may not be enough to maintain the dignity of an individual if he is not free from wants and misery, a number of Directives have been included in Part IV of the Constitution, exhorting the State so to shape its social and economic policies that, *inter alia,* "all citizens, men and women equally, have the right to an adequate means of livelihood" [*Art.* 39(a)], "just and humane conditions of work" [*Art.* 42], and "a decent standard of life and full enjoyment of leisure and social and cultural opportunities"[*Art.* 43]. Our Supreme Court has come to hold that the right to dignity is a fundamental right.[27]

In order to remove poverty and to bring about a socio-economic revolution, the list of Directives was widened by the Constitution (42nd Amendment) Act, 1976, and it was provided that,—in order that such welfare measures for the benefit of the masses may not be defeated,—any measure for the implementation of *any* of the Directives shall be immune from any attack in the Courts on the ground that such measure contravenes any person's fundamental rights under Art. 14 or 19.[28]

Fundamental Duties.

The philosophy contained in the Preamble, as explained in the foregoing pages, has been further highlighted by emphasising that each individual shall not only have the fundamental rights in Part III of the Constitution to ensure his liberty of expression, faith and worship, equality of opportunity and the like, but also a corresponding fundamental duty, such as to uphold the sovereignty, unity and integrity of the nation, to maintain secularism and the common brotherhood amongst all the people of India. This has been done by inserting Art. 51A, laying down ten 'Fundamental Duties', by the Constitution (42nd Amendment) Act, 1976 (see, further, under Chap. 8, *post*).

A fitting commentary on the foregoing contents of the Preamble to *our* Constitution can be best offered by quoting a few lines from Prof. Ernest Barker, one of the modern thinkers on democratic government.[29]

> ". . . . .there must be a *capacity* and a *passion* for the enjoyment of liberty—there must be a sense of personality in each, and of respect for personality in all, generally spread through the whole community—before the democratic State can be *truly achieved* . . . Perhaps it can be fairly demanded only in a community which has achieved a *sufficient standard of material existence,* and a *sufficient degree of national homogeneity* to devote itself to an ideal of liberty which has to be *worked out in each by the common effort of all.* If the problems of material existence are still absorbing... the ideal of living a common life of freedom—in other words, of attaining a particular quality of life—will seem an ideal dream. If, again, the problems of national homogeneity are still insistent, and there is *no common feeling of fellowship*—if some sections of the community are regarded by others, whether on the ground of their inferior education, or on the ground of their inferior stock or any other ground, as essentially alien and heterogeneous—the ideal of the common life of freedom will seem equally illusory...."[29]

Combining the ideals of political, social and economic democracy with that of equality and fraternity, the Preamble seeks to establish what Mahatma Gandhi described as "the India of My Dreams", namely,—

> " . . . . .an India, in which the poorest shall feel that it is their country in whose making they have an effective voice; . . .an India in which all communities shall live in perfect harmony. There can be no room in such an India for the curse of untouchability or the curse of intoxicating drinks and drugs. Women will enjoy the same rights as men."[30]

No wonder such a successful combination in the text of our Preamble would receive unstinted approbation from Ernest Barker, who has reproduced this Preamble at the opening of his book on Social and Political Theory, observing that the Preamble to the Constitution of India states,

> "in a brief and pithy form the argument of much of the book, and it may accordingly *serve as a key-note.*"[31]

REFERENCES

1. (1947) C.A.D. 304 (moved by Pandit Jawaharlal Nehru on December 13, 1946).
2. The words in italics were inserted by the Constitution (42nd Amendment) Act, 1976. See Author's *Constitutional Law of India,* Preamble.
3. *A.K. Gopalan* v. *State of Madras,* (1950) S.C.R. 88 (*198*); *Union of India* v. *Madan Gopal,* (1954) S.C.R. 541 (*555*).
4. *Re* Berubari Union, AIR 1960 S.C. 845 (*846*).
5. So called since the Imperial Conference 1926. Later it has come to be mentioned simply as "The Commonwealth" [Cf. BARKER, *Essays on Government* (1956), pp. 16-18].

   The concept of Commonwealth as an association has considerably weakened when the United Kingdom virtually segregated itself by refusing to protest against the Racist atrocities committed by the Government of South Africa and later by imposing the visa system upon immigrants from India and some other states.
6. C.A.D., 16-5-1949.
7. C.A.D., 22-1-1947.
8. The survival of this representative democracy and Parliamentary Government in India for about six decades since Independence should silence her critics, since military regime prevailed in her neighbouring countries until recently. In 1981, the Constitution of Pakistan of 1972 was supplanted by the Provisional Constitution Order, 1981, under which Martial Law was imposed under Gen. Zia-ul-Haq as the Chief Martial Law Administrator, who assumed power in 1977. It is only after Zia's death that in December,

1988, elections were held. But the future is not so certain. Similarly, in Bangladesh, Martial Law was imposed since the assassination of Mujibar Rahaman and the assumption of military rule by Ziaur Rahaman, in 1975 and later on by Lt. General Ershad, until 1986 when an election was held and General Ershad elected President amidst a tumultuous situation. President Ershad handed over his power to a neutral Vice-President for conducting fresh elections. At the election Begum Khaleda Zia became the Prime Minister in March, 1991. In November, 1994, Parliament was dissolved, and, at the fresh election, Mrs. Hasina Wazed was elected the new Prime Minister.

9. This is now expressly ensured by amending Art. 74(1) by the Constitution (42nd Amendment) Act, 1976, and the 44th Amendment Act, 1978.
10. *S.R. Chaudhari* v. *State of Punjab,* (2001) 7 S.C.C. 126.
11. Inaugural address of Pandit Nehru at the Seminar on Parliamentary Democracy on 25-2-1956.
12. Speech of the Vice-President, *ibid.*
13. *State of Punjab* v. *G.S. Gill,* A.I.R. 1997 S.C. 2324.
14. *Samantha* v. *State of A.P.,* A.I.R. 1997 S.C. 3297.
15. *Dalmia Cement (Bharat) Ltd.* v. *Union of India,* (1996) 10 S.C.C. 104.
16. *Ashok Kumar Gupta* v. *State of U.P.,* (1997) 5 S.C.C. 201.
17. *Dalmia Cement (Bharat) Ltd.* v. *Union of India,* (1996) 10 S.C.C. 104.
18. *S.S. Bola* v. *B.D. Sardana,* (1997) 8 S.C.C. 522.
19. *S.S. Bola* v. *B.D. Sardana,* (1997) 8 S.C.C. 522.
20. Cf. *Crown Aluminum Works* v. *Workmen,* (1958) S.C.R. 651.
21. *Statesman,* 25-10-1976, p. 1; 28-10-1976, p. 1.
22. See, further, Author's *Constitutional Law of India,* Preamble.
23. It must be pointed out, in this context, that both 'socialism' and 'secularism' are vague words and, in the absence of any explanation of these words in the Constitution, such vagueness is liable to be capitalised by interested political groups and to create confusion in the minds of the masses of the Republic to instruct whom is one of the objects of the Preamble. The Janata Party sought to offer such explanation, by amending Art. 366 of the Constitution by the 45th Amendment Bill, 1976, which, however, was thwarted by the Congress opposition in the Rajya Sabha.

In the absence of such explanation, it would remain a matter of controversy whether the object of 'socialism' under the Indian Constitution simply means 'freedom from exploitation' or State Socialism or even Marxism. Similarly, 'secularism' might be used as an instrument of unrestrained communalism or bigotry or even anti-religionism, as distinguished from 'equal respect for all religions'. Instead of these words serving to elucidate the articles of the Constitution, the meaning of these words shall have to be gathered from the operative provisions, which, in legal interpretation, cannot be controlled by the Preamble. Thus, from Art. 43A, which has been introduced by the same 42nd Amendment Act, 1976, it is clear that 'socialism', as envisaged by the Preamble, will include 'participation of workers' in the management' of an industry, and consequently, profit-sharing. This is, obviously, a step forward from Capitalism to collectivism.

The Supreme Court is also facilitating the advent of socialism by interpreting other provisions of the Constitution in the light of the word 'socialism' in the Preamble [*Excel Wear* v. *Union of India,* AIR 1979 S.C. 25 (para 24); *Randhir* v. *Union of India,* AIR 1982 S.C. 879 (para 8); *Nakara* v. *Union of India,* AIR 1983 S.C. 130 (paras 33-34); *Minerva Mills* v. *Union of India,* AIR 1980 S.C. 1789].

According to the Supreme Court, the goal of Indian Socialism is "a blend of Marxism and Gandhism, leaning heavily towards Gandhian socialism" [*Nakara* v. *Union of India, ibid.*].

The budget for 1992-93 showed and subsequent budgets confirm that the trend of the Government is now away from collective ownership of means of production. Power, steel, airways and many other fields have been opened for free enterprise. The demise of U.S.S.R. has hastened this change of approach. Public sector undertakings are being privatised, the Industrial Finance Corporation Act has been repealed and the corporation has been converted into a company. Same has been the fate of many government corporations. It will not be far away from the truth to assert that the pendulum has now swung from Socialism to the other direction of *laissez faire,* under which Indian industry will not have to face open competition from formidable foreign rivals.

24. The Supreme Court has pointed out that in promoting the unity of India, the *common* culture and heritage of India, of which the foundation is the Sanskrit language, must play a leading part [*Santosh* v. *Secretary, Ministry of H.R.D.,* AIR 1995 S.C. 293 (para 18)].
25. *Bommai* v. *Union of India,* A.I.R. 1994 S.C. 1918. Also see *Sri Adi Visheshwar of Kashi Vishwanath Temple, Varanasi* v. *State of U.P.,* (1997) 4 S.C.C. 606 (para 26).
26. Islam is the State religion of Pakistan under the Constitution of 1972. This position had been maintained by the Provisional Constitution Order, 1981, issued by General Zia-ul-Haq, who assumed power in 1977 as the Chief Martial Law Administrator. In Bangladesh, Lieut. General Ershad, the President and Chief Martial Law Administrator declared that Islam would be the State religion [*Statesman,* 30-12-1982].
27. *L.I.C.* v. *Consumer Centre,* A.I.R. 1995 S.C. 1811.
28. This amendment of Art. 31C, by the 42nd Amendment, has not been touched by the 44th Amendment Act, 1978, because the Congress Opposition in the Rajya Sabha thwarted the Janata attempt, through the 45th Amendment Bill, to revert to the pre-1976 position.
29. BARKER, *Reflections on Government* (Paperback), pp. 192-93.
30. M.K. GANDHI, *India of My Dreams,* pp. 9-10.
31. BARKER, *Principles of Social and Political Theory* (1951, Paperback), Preface, pp. vi, ix.

    In recent cases (*vide* author's *Shorter Constitution of India,* Preamble), the Supreme Court is relying more and more on the Preamble in interpreting the enacting provisions and implementing the Directive Principles (Part IV) of the Constitution.

CHAPTER 4

OUTSTANDING FEATURES OF OUR CONSTITUTION

Drawn from different sources.

I. THE Constitution of India is remarkable for many outstanding features which will distinguish it from other Constitutions even though it has been prepared after "ransacking all the known Constitutions of the world" and most of its provisions are substantially borrowed from others. As Dr. Ambedkar observed,[1]—

> "One likes to ask whether there can be anything new in a Constitution framed at this hour in the history of the world. More than hundred years have rolled when the first written Constitution was drafted. It has been followed by many other countries reducing their Constitutions to writing . . . Given these facts, all Constitutions in their main provisions must look similar. The only new things, if there be any, in a Constitution framed so late in the day are the variations made *to remove the faults and to accommodate it to the needs of the country.*"[1]

So, though our Constitution may be said to be a 'borrowed' Constitution, the credit of its framers lies in gathering the best features of each of the existing Constitutions and in modifying them with a view to avoiding the faults that have been disclosed in their working and to adapting them to the existing conditions and needs of this country. So, if it is a 'patchwork', it is a 'beautiful patchwork'.[2]

There were members in the Constituent Assembly[2] who criticised the Constitution which was going to be adopted as a 'slavish imitation of the West' or 'not suited to the genius' of the people. Many apprehended that it would be unworkable. But the fact that it has survived for about sixty years, while Constitutions have sprung up only to wither away in countries around us, such as Burma and Pakistan, belies the apprehension of the critics of the Indian Constitution.

Supplemented by multiple amendments, and practically recast by the 42nd, 43rd and 44th Amendments, 1976-78.

II. It must, however, be pointed out at the outset that many of the original features of the 1949-Constitution have been substantially modified by the 78 Amendments which have been made up to 1996,—of which the 42nd Amendment Act, 1976 (as modified by the 43rd and 44th Amendment Acts, 1977-78), has practically recast the Constitution in vital respects.

The 73rd Amendment Act which was brought into force in April 1993 has added 16 articles which provide for establishment of and elections to Panchayats. They comprise a new part, Part IX. By the same Amendment a new schedule (Sch. 11) has been added which enumerates the functions to be delegated to the Panchayats.

The 74th Amendment Act was passed to establish Municipalities and provides for elections to them. It has inserted Part 9A consisting of 18 articles. Schedule 12 inserted by the Amendment mentions the functions to be assigned to the Municipalities. This Amendment came into force on 1st June 1993.

The longest known Constitution.

III. The Constitution of India has the distinction of being the most lengthy and detailed constitutional document the world has so far produced. The original Constitution contained as many as 395 Articles and 8 Schedules (to which additions were made by subsequent amendments). Even after the repeal of several provisions it still (in 2008) contains 444 Articles and 12 Schedules.[3]

During the period 1950-2000, while a number of Articles have been omitted,—64 Articles and 4 Schedules have been *added* to the Constitution, *viz.,* Arts. 21A, 31A-31C, 35A, 39A, 43A, 48A, 51A, 131A, 134A, 139A, 144A, 224A, 233A, 239A, 239AA, 239AB, 239B, 243, 243A to 243ZG, 244A, 257A, 258A, 290A, 300A, 312A, 323A, 323B, 338A, 350A, 350B, 361A, 363A, 371A-371-I, 372A, 378A, 394A.

This extraordinary bulk of the Constitution is due to several reasons :

Incorporates the accumulated experience of different Constitutions.

(i) The framers sought to incorporate the accumulated experience gathered from the working of all the known Constitutions and to avoid all defects and loopholes that might be anticipated in the light of those Constitutions. Thus, while they framed the Chapter on the Fundamental Rights upon the model of the American Constitution, and adopted the Parliamentary system of Government from the United Kingdom, they took the idea of the Directive Principles of State Policy from the Constitution of Eire, and added elaborate provisions relating to Emergencies in the light of the Constitution of the German Reich and the Government of India Act, 1935. On the other hand, our Constitution is more full of words than other Constitutions because it has embodied the modified results of judicial decisions made elsewhere interpreting comparable provisions, in order to minimise uncertainty and litigation.

Detailed administrative provisions included.

(ii) Not contented with merely laying down the fundamental principles of governance (as the American Constitution does), the authors of the Indian Constitution followed and reproduced the Government of India Act, 1935, in providing matters of administrative detail,—not only because the people were accustomed to the detailed provisions of that Act, but also because the authors had the apprehension that in the present conditions of the country, the Constitution might be perverted unless the form of administration was also included in it. In the words of Dr. Ambedkar,[1]

> ". . . It is perfectly possible to pervert the Constitution without changing the form of administration."

Any such surreptitious subversion of the Constitution was sought to be prevented by putting detailed provisions in the Constitution itself, so that they might not be encroached upon without amending the Constitution.

The very adoption of the bulk of the provisions from the Government of India Act, 1935, contributed to the volume of the new Constitution inasmuch as the Act of 1935 itself was a lengthy and detailed organic law. So much was borrowed from that Act because the people were familiar with the existing system.

It was also felt that the smooth working of an infant democracy might be jeopardised[4] unless the Constitution mentioned in detail things which were left in other Constitutions to ordinary legislation. This explains why we have in our Constitution detailed provisions about the organisation of the Judiciary, the Services, the Public Service Commissions, Elections and the like. It is the same ideal of 'exhaustiveness' which explains why the provisions of the Indian Constitution as to the division of powers between the Union and the States are more numerous than perhaps the aggregate of the provisions relating to that subject in the Constitution of the U.S.A., Australia and Canada.

Peculiarity of the Problems to be solved.

(iii) The vastness of the country (see Table I), and the peculiar problems to be solved have also contributed towards the bulk of the Constitution. Thus, there is one entire Part [*Part* XVI] relating to the Scheduled Castes and Tribes and other backward classes; one Part [*Part* XVIII] relating to Official Language and another [*Part* XVII] relating to Emergency Provisions.

Constitution of the Units also included.

(iv) While the Constitution of the United States deals only with the Federal Government and leaves the States to draw up their own Constitutions, the Indian Constitution provides the Constitutions of both the Union and the Units (*i.e.*, the States), with the same fullness and precision. Since the Units of the federation differed in their historical origins and their political development, special provisions for different classes of the Units[5] had to be made, such as the Part B States (representing the *former Indian States*), the Part C States (representing the Centrally Administered areas) and some smaller Territories in Part D. This also contributed to the bulk of the 1949-Constitution (see Table III).

Special provisions for Jammu & Kashmir.

Though, as has just been said, the Constitution of the State was provided by the Constitution of India, the State of Jammu and Kashmir was accorded a special status and was allowed to make its own State Constitution. Even all the other provisions of the Constitution of India did not directly apply to Jammu and Kashmir but depended upon an Order made for the President in Constitution with the Government of State,—for which provision had to be made in Art. 370 [see Chap. 15].

Nagaland, Sikkim, etc.

Even after the inauguration of the Constitution, special provisions have been inserted [*e.g.*, *Arts.* 371-371I], to meet the regional problems and demands in certain States, such as Nagaland, Assam, Manipur, Andhra Pradesh, Maharashtra, Gujarat, Sikkim, Mizorma, etc.

Federal Relations elaborately dealt with.

(v) Not only are the provisions relating to the Units elaborately given, the relations between the Federation and the Units and the Units *inter se,* whether legislative or administrative, are also exhaustively codified, so as to eliminate conflicts as far as possible. The lessons drawn from the political history of India which induced the framers of the Constitution to give it a unitary bias, also prompted them to make detailed provisions "regarding the distribution of powers and functions between the Union and the States in all aspects of their administrative and other activities",[6] and also as regards inter-State relations, co-ordination and adjudication of disputes amongst the States.

Both Justiciable and Non-justiciable Rights included: Fundamental Rights, Directive Principles, and Fundamental Duties.

(vi) There is not only a Bill of Rights containing justiciable fundamental rights of the individual [*Part* III] on the model of the Amendments to the *American* Constitution but also a Part [*Part* IV] containing Directive Principles, which confer no justiciable rights upon the individual but are nevertheless to be regarded as 'fundamental in the governance of the country',—being in the nature of 'principles of social policy' as contained in the Constitution of *Eire* (*i.e.,* the Republic of Ireland). It was considered by the makers of *our* Constitution that though they could not, owing to their very nature, be made legally enforceable, it was well worth to incorporate in the Constitution some basic non-justiciable rights which would serve as moral restraints upon future governments and thus prevent the policy from being torn away from the idea which inspired the makers of the organic law.

Even the Bill of Rights (*i.e.,* the list of Fundamental Rights) became bulkier than elsewhere because the framers of the Constitution had to include novel matters owing to the peculiar problems of *our* country, *e.g.,* untouchability, preventive detention.

To the foregoing list, a notable addition has been made by the 42nd Amendment inserting one new Chapter of Fundamental Duties of Citizens [*Part* IVA, *Art.* 51A], which though not attended with any legal sanction, have now to be read along with the Fundamental Rights [see, further, under Chap. 8, *post*].

More Flexible than Rigid.

IV. Another distinctive feature of the Indian Constitution is that it seeks to impart flexibility to a written federal Constitution.

It is only the amendment of a few of the provisions of the Constitution that requires ratification by the State Legislatures and even then ratification by only 1/2 of them would suffice (while the American Constitution requires ratification by 3/4 of the States).

The rest of the Constitution may be amended by a special majority of the Union Parliament, *i.e.,* a majority of not less than 2/3 of the members of each House present and voting, which, again, must be majority of the total membership of the House [see Chap. 10].

On the other hand, Parliament has been given the power to alter or modify many of the provisions of the Constitution by a simple majority as is required for general legislation, by laying down in the Constitution that such changes "*shall not be deemed to be 'amendments' of the Constitution*". Instances to the point are—(a) Changes in the names, boundaries, areas of, and amalgamation and separation of States [*Art.* 4]. (b) Abolition or creation of the Second Chamber of a State Legislature [*Art.* 169]. (c) Administration of Scheduled Areas and Scheduled Tribes [*Para* 7 of the 5th Schedule and *Para* 21 of the 6th Schedule]; (d) Creation of Legislatures and Council of Ministers for certain Union Territories [*Art.* 239A(2)].

Legislation as supplementing the Constitution.

Yet another evidence of this flexibility is the power given by the Constitution itself to Parliament to supplement the provisions of the Constitution by legislation. Though the makers of the Constitution aimed at exhaustiveness, they realised that it was not possible to anticipate all exigencies and to lay down detailed provisions in the Constitution to meet all situations and for all times.

(a) In various Articles, therefore, the Constitution lays down certain basic principles and empowers Parliament to supplement these principles by legislation. Thus, (i) as to citizenship, Arts. 5-8 only lay down the conditions for acquisition of citizenship at the commencement of the Constitution and Art. 11 vests plenary powers in Parliament to legislate on this subject. In pursuance of this power, Parliament has enacted the Citizenship Act, 1955, so that in order to have a full view of the law of citizenship in India, study of the Constitution has to be supplemented by that of the Citizenship Act. (ii) Similarly, while laying down certain fundamental safeguards against preventive detention, Art. 22(7) empowers Parliament to legislate on some subsidiary matters relating to the subject. The laws made under this power, have, therefore, to be read along with the provisions of Art. 22. (iii) Again, while banning 'untouchability', Art. 17 provides that it shall be an offence 'punishable in accordance with law', and in exercise of this power, Parliament has enacted the Protection of Civil Rights Act, 1955[7] which must be referred to as supplementing the constitutional prohibition against untouchability. (iv) While the Constitution lays down the basic provisions relating to the election of the President and Vice-President, Art. 71(3) empowers Parliament to supplement these constitutional provisions by legislation, and by virtue of this power Parliament has enacted the Presidential and Vice-Presidential Elections Act, 1952.

The obvious advantage of this scheme is that the law made by Parliament may be modified according to the exigencies for the time being, without having to resort to a constitutional amendment.

(b) There are, again, a number of articles in the Constitution which are of a tentative or transitional nature and they are to remain in force only so long as Parliament does not legislate on the subject, *e.g.*, exemption of Union property from State taxation [*Art.* 285]; suability of the State [*Art.* 300(1)].

The Constitution, thus, ensures adaptability by prescribing a variety of modes in which its original text may be changed or supplemented, a fact which has evoked approbation from Prof. Wheare—

> "This variety in the amending process is wise but is *rarely found*."[8]

This wisdom has been manifested in the ease with which Sikkim, a Protectorate since British days, could be brought under the Constitution—first, as an 'associate State' (35th Amendment Act), and then as a full-fledged State of the Union (36th Amendment Act, 1975).

Reconciliation of a written Constitution with Parliamentary sovereignty.

V. This combination of the theory of 'fundamental law' which underlies the written Constitution of the United States with the theory of 'Parliamentary sovereignty' which underlies the unwritten Constitution of *England* is the result of the liberal philosophy of the framers of the Indian Constitution which has been so nicely expressed by Pandit Nehru:

> "While we want this Constitution to be as solid and permanent as we can make it, there is no permanence in Constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop the nation's growth, the growth of a living, vital, organic people. . . In any event, we could not make this Constitution as rigid that it cannot be *adapted* to changing conditions. When the world is in turmoil and we are passing through a very swift period of transition, what we may do to-day may not be wholly capable tomorrow."[9]

The flexibility of *our* Constitution is illustrated by the fact that during the first 59 years of its working, it has been amended 94 times. Vital changes have thus been effected by the First, Fourth, Twenty-fourth, Twenty-fifth, Thirty-ninth, Forty-second, Forty-fourth, Seventy-third and Seventy-fourth Amendments to the Constitution, including amendments to the fundamental rights, powers of the Supreme Court and the High Courts.

Dr. Jennings[10] characterised *our* Constitution as rigid for two reasons: (a) that the process of amendment was complicated and difficult, (b) that matters which should have been left to ordinary legislation having been incorporated into the Constitution, no change in these matters is possible without undergoing the process of amendment. We have seen that the working of the Constitution during six decades has *not* justified the apprehension that the process of amendment is very difficult [see also Chap. 10, *post*]. But the other part of his reasoning is obviously sound. In fact, his comments on this point have proved to be prophetic. He cited Art. 224 as an illustration of a provision which had been unnecessarily embodied in the Constitution:

> "An example taken at random is article 224, which empowers a retired judge to sit in a High Court. Is that a provision of such constitutional importance that it needs to be constitutionally protected, and be incapable of amendment except with the approval of two-thirds of the members of each House sitting and voting in the Union Parliament?"[11]

As Table IV will show it has required an amendment of the Constitution, namely, the Seventh Amendment of 1956, to amend this article to provide for the appointment of Additional Judges instead of recalling retired Judges. Similar amendments have been required, once to provide that a Judge of a High Court who is transferred to another High Court shall not be entitled to compensation [*Art.* 222] and, again, to provide for compensation. It is needless to multiply such instances since they are numerous.

The greatest evidence of flexibility, however, has been offered by the amendments since 1976. The 42nd Amendment Act, 1976, after the Constitution had worked for over quarter of a century, introduced vital changes and upset the balance between the different organs of the State.[11] Of course, behind this flexibility lies the assumption that the Party in power wields more than a two-thirds majority in both Houses of Parliament.[11]

Role of Conventions under the Constitution.

VI. It is also remarkable that though the framers of the Constitution attempted to make an exhaustive code of organic law, room has been left for the growth of conventions to supplement the Constitution in matters where it is silent. Thus, while the Constitution embodied the doctrine of Cabinet responsibility in Art. 75, it was not possible to codify the numerous conventions which answer the problems as they may arise in England, from time to time, in the working of the Cabinet system. Take, for instance, the question whether the Ministry should resign whenever there is an adverse vote against it in the House of the People, or whether it is at liberty to regard an accidental defeat on a particular measure as a 'snap vote'.[12] Again, the Constitution cannot possibly give any indication as to which issue should be regarded as a 'vital issue' by a Ministry, so that on a defeat on such an issue the Ministry should be morally bound to resign. Similarly, in what circumstances a Ministry would be justified in advising the President to dissolve Parliament instead of resigning upon an adverse vote, can only be established by convention.

Sir Ivor Jennings[10] is, therefore, justified in observing that—

> "The machinery of government is essentially British and the whole collection of British constitutional conventions has apparently been incorporated as conventions."

Fundamental Rights, and Constitutional Remedies.

VII. While the Directive Principles are not enforceable in the Courts, the Fundamental Rights, included in Part III, are so enforceable at the instance of any person whose fundamental right has been infringed by any action of the State,—executive or legislative—and the remedies for enforcing these rights, namely, the writs of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* are also guaranteed by the Constitution. Any law or executive order which offends against a fundamental right is liable to be declared void by the Supreme Court or the High Court.

It is through a misapprehension of these provisions that the Indian Constitution has been described by some critics as a 'lawyer's paradise'.[12] According to Sir Ivor Jennings,[10] this is due to the fact that the Constituent Assembly was dominated by 'the lawyer-politicians'. It is they who thought of codifying the individual rights and the prerogative writs though none in *England* would ever cherish such an idea. In the words of Sir Ivor—

> "Though no English lawyer would have thought of putting the prerogative writs into a Constitution, the Constituent Assembly did so. . .These various factors have given India a most complicated Constitution. Those of us who claim to be

> constitutional lawyers can look with equanimity on this exaltation of our profession. But constitutions are intended to enable the process of Government to work smoothly, and not to provide fees for constitutional lawyers. The more numerous the briefs the more difficult the process of government becomes. India has perhaps placed too much faith in us."[10]

Judicial review makes the Constitution legalistic.

With due respect to the great constitutional expert,[10] these observations disclose a failure to appreciate the very foundation of the Indian Constitution. Sir Ivor omits to point out that the fathers of the Indian Constitution preferred the American doctrine of 'limited government' to the English doctrine of Parliamentary sovereignty.

In *England,* the birth of modern democracy was due to a protest against the absolutism of an autocratic executive and the English people discovered in Parliamentary sovereignty an adequate solution of the problem that faced them. The English political system is founded on the unlimited faith of the people in the good sense of their elected representatives. Though, of late, detractions from its omnipotent authority have taken place because the ancient institution at Westminster has grown incapable of managing myriads of modern problems with the same ease as in Victorian age, nonetheless, never has anybody in England thought of placing limitations on the authority of Parliament so that it might properly behave.

The Founding Fathers of the *American* Constitution, on the other hand, had the painful experience that even a representative body might be tyrannical, particularly when they were concerned with a colonial Empire. Thus it is that the Declaration of Independence recounts the attempts of the British "Legislature to extend an unwarrantable jurisdiction over us" and how the British people had been "deaf of the voice of justice". At heavy cost had the colonists learnt about the frailty and weakness of human nature when the same Parliament which had forced Charles I to sign the Petition of Right (1628) to acknowledge that no tax could be levied without the consent of Parliament, did, in 1765, and the years that followed, insist on taxing the colonies, regardless of their right of representation, and attempt to enforce such undemocratic laws through military rule.

Hence, while the English people, in their fight for freedom against autocracy, stopped with the establishment of the supremacy of the law and Parliament as the sole source of that law, Americans had to go further and to assert that there is to be a law superior to the Legislature itself and that it was the restraints of this paramount written law that could only save them from the fears of absolutism and autocracy which are ingrained in human nature itself.

As will be more fully explained in the Chapter on Fundamental Rights, the Indian experience of the application of the British Rule of Law in India was not altogether happy and there was a strong feeling that it was not administered with even hands by the foreign rulers in India as in their own land. The "Sons of Liberty' in India had known to what use the flowers of the English democratic system, *viz.,* the Sovereignty of Parliament and the Rule of Law, could be put in trampling down the rights of man under an

Imperial rule. So, in 1928, long before the dawn of independence in India, the Motilal Nehru Committee asserted that

> "Our first care could be to have our fundamental rights guaranteed in a manner *which will not permit their withdrawal under any circumstances.*"

Now, judicial review is a necessary concomitant of 'fundamental rights', for, it is meaningless to enshrine individual rights in a written Constitution as 'fundamental rights' if they are not enforceable, in Courts of law, against any organ of the State, legislative or executive. Once this choice is made, one cannot help to be sorry for the litigation that ensues. Whatever apprehensions might have been entertained in some quarters in India at the time of the making of the Indian Constitution, there is hardly anybody in India to-day who is aggrieved because the Supreme Court, each year, invalidates a dozen of statutes and a like number of administrative acts on the ground of violation of the fundamental rights.

At the same time, it must be pointed out that since the inauguration of the Constitution, various provisions have been inserted into the Constitution by amendments, which have taken out considerable areas from the pale of judicial review, *e.g.*, by inserting Arts. 31A-31C; and by 1995 as many as 284 Acts,—Central and State,—have been shielded from judicial review on the ground of contravention of the Fundamental Rights, by enumerating them under the 9th Schedule, which relates to Art. 31B.[11]

VIII. An independent Judiciary, having the power of 'Judicial review', is another prominent feature of *our* Constitution.

On the other hand, we have avoided the other-extreme, namely, that of 'judicial supremacy', which may be a logical outcome of an over-emphasis on judicial review, as the American experience demonstrates.

Judicial power of the State exercisable by the Courts under the Constitution as sentinels of Rule of Law is a basic feature of the Constitution.[13]

Compromise between Judicial Review and Parliamentary Supremacy.

Indeed, the harmonisation which our Constitution has effected between Parliamentary Sovereignty and a written Constitution with a provision for Judicial Review, is a unique achievement of the framers of *our* Constitution. An absolute balance of powers between the diferent organs of government is an impracticable thing and, in practice, the final say must belong to some one of them. This is why the rigid scheme of Separation of Powers and the checks and balances between the organs in the Constitution of the *United States* has failed in its actual working, and the Judiciary has assumed supremacy under its powers of interpretation of the Constitution to such an extent as to deserve the epithet of the 'safety valve' or the 'balance-wheel' of the Constitution. As one of her own Judges has said (Chief Justice HUGHES), "The Constitution (of the U.S.A.) is what the Supreme Court says it is". It has the power to invalidate a law duly passed by the Legislature not only on the ground that it transgresses the legislative powers vested in it by the Constitution or by the prohibitions contained in the Bill of Rights but also on the ground that it is opposed to some general principles said to underlie vague expressions, such as due process, the contents of which not being explicitly laid down in the Constitution, are definable only by the Supreme Court. The American Judiciary thus sits over the *wisdom* of any legislative policy as if it were a third Chamber or super-Chamber of the Legislature.

Under the *English* Constitution, on the other hand, Parliament is supreme and "can do everything that is not naturally impossible" (*Blackstone*) and the Courts cannot nullify any Act of Parliament on any ground whatsoever. As MAY puts it—

> "The Constitution has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction. A law may be *unjust* and contrary to the principles of sound government. But Parliament is not controlled in its discretion and when it errs, its errors can be corrected only by itself."

So, English Judges have denied themselves any power "to sit as a court of appeal against Parliament".

The *Indian* Constitution wonderfully adopts the *via media* between the American system of Judicial Supremacy and the English principle of Parliamentary Supremacy, by endowing the Judiciary with the power of declaring a law as unconstitutional if it is beyond the competence of the Legislature according to the distribution of powers provided by the Constitution, or if it is in contravention of the fundamental rights guaranteed by the Constitution or of any other mandatory provision of the Constitution, *e.g.,* Arts. 286, 299, 301, 304; but, at the same time, depriving the Judiciary of any power of 'judicial review' of the wisdom of legislative policy. Thus, it avoided expressions like 'due process', and made fundamental rights such as that of liberty and property subject to regulation by the Legislature.[11] But the Supreme Court has discovered 'due process' in Art. 21 in *Maneka Gandhi.*[14] Further the major portion of the Constitution is liable to be amended by the Union Parliament by a special majority, if in any case the Judiciary proves too obtrusive. The theory underlying the Indian Constitution in this respect can hardly be better expressed than in the words of Pandit Nehru:

> "No Supreme Court, no Judiciary, can stand in judgment over the sovereign will of Parliament, representing the will of the entire community. It can pull up that sovereign will if it goes wrong, but, in the ultimate analysis, where the future of the community is concerned, no Judiciary can come in the way. . . Ultimately, the fact remains that the Legislature must be supreme and must not be interfered with by the Courts of Law in such measures as *social reform.*"

Our Constitution thus places the supremacy at the hands of the Legislature as much as that is possible within the bounds of a written Constitution. But, as has been mentioned earlier, the balance between Parliamentary Sovereignty and Judicial Review was seriously disturbed, and a drift towards the former was made, by the Constitution (42nd Amendment) Act, 1976, by inserting some new provisions, *e.g.,* Arts. 31D, 32A, 131A, 144A, 226A, 228A, 323A-B, 329A.

The Janata Government, coming to power in 1977, restored the pre-1976 position, to a substantial extent, through the 43rd and 44th Amendments, 1977-78, by repealing the following Articles which had been inserted by the 42nd Amendment—31D, 32A, 131A, 144A, 226A, 228A, 329A; and by restoring Art. 226 to its original form (substantially).

On the other hand, the Judiciary has gained ground by itself declaring that 'judicial review' is a 'basic feature' of *our* Constitution, so that so long as the Supreme Court itself does not revise its opinion in this behalf, any amendment of the Constitution to take away judicial review of legislation on the ground of contravention of any provision of the Constitution shall itself be liable to be invalidated by the Court (see at the end of this Chapter).

Fundamental Rights subject to reasonable regulation by Legislature.

IX. The balancing between supremacy of the Constitution and sovereignty of the Legislature is illustrated by the novel declaration of Fundamental Rights which our Constitution embodies.

The idea of incorporating in the Constitution a 'Bill of Rights' has been taken from the Constitution of the United States. But the guarantee of individual rights in *our* Constitution has been very carefully balanced with the need for the *security of the State itself*.

American experience demonstrates that a written guarantee of fundamental rights has a tendency to engender an atomistic view towards society and the State which may at times prove to be dangerous to the common welfare. Of course, America has been saved from the dangers of such a situation by reason of her Judiciary propounding the doctrine of 'Police Powers' under which the Legislature is supposed to be competent to interfere with individual rights wherever they constitute a 'clear danger' to the safety of the State and other collective interests.

Instead of leaving the matter to the off-chance of judicial protection in particular cases, the Indian Constitution makes each of the fundamental rights subject to legislative control under the terms of the Constitution itself, apart from those exceptional cases where the interests of national security, integrity or welfare should exclude the application of fundamental rights altogether [*Arts.* 31A-31C].[11]

Social Equality also guaranteed by the Constitution.

X. Another peculiarity of the Chapter on Fundamental Rights in the Indian Constitution is that it aims at securing not merely political or legal equality, but *social* equality as well. Thus, apart from the usual guarantees that the State will not discriminate between one citizen and another merely on the ground of religion, race, caste, sex or place of birth,—in the matter of appointment, or other employment, offered by the State,—the Constitution includes a prohibition of 'untouchability, in any form and lays down that no citizen may be deprived of access to any public place, of the enjoyment of any public amenity or privilege, only on the ground of religion, race, caste, sex or place of birth.

We can hardly overlook in this context that under the Constitution of the *U.S.A.*, racial discrimination persists even to-day, notwithstanding recent judicial pronouncements to the contrary. The position in the United Kingdom is no better as demonstrated by current events.

Fundamental Rights checkmated by Fundamental Duties.

XI. Another feature, which was not in the original Constitution has been introduced by the 42nd Amendment, 1976, by introducing Art. 51A as Part IVA of the Constitution.

42nd Amendment 1976.

Though the Directives in Part IV of the Constitution were not enforceable in any manner and had to give way before the Fundamental Rights, under the original Constitution, the situation was reversed, through the backdoor, by the 42nd Amendment, 1976, by amending Art. 31C[11]—shielding *all* the Directives in Part IV of the Constitution from the Fundamental Rights in Part III. But this object has been frustrated by the majority decision in the case of *Minerva Mills* v. *Union of India,*[15] as a result of which Art. 31C will shield from unconstitutionality on the ground of violation of Art. 13 those laws which implement only the Directives specified in Art. 39(b)-(c) and not any other Directive included in Part IV of the Constitution.

In the same direction, the 42nd Amendment Act introduced 'Fundamental Duties', to circumscribe the Fundamental Rights, even though the Duties, as such, cannot be judicially enforced (see, further, under Chap. 8, *post*).

Universal Franchise without Communal Representation.

XII. The adoption of universal adult suffrage [*Art.* 326], *without any qualification* either of sex, property, taxation or the like, is a 'bold experiment' in India, having regard to the vast extent of the country and its population, with an over-whelming illiteracy (see Table I, *post*). The suffrage in India, it should be noted, is wider than that in England or the United States. The concept of popular sovereignty, which underlies the declaration in the Preamble that the Constitution is adopted and given by the 'people of India' unto themselves, would indeed have been hollow unless the franchise—the only effective medium of popular sovereignty in a modern democracy—were extended to the entire adult population which was capable of exercising the right and an independent electoral machinery (under the control of the Election Commission) was set up to ensure the free exercise of its. The electorate has further been widened by lowering the voting age from 21 to 18, by the 61st Constitution Amendment Act, 1988.

That, notwithstanding the outstanding difficulties, this bold experiment has been crowned with success will be evident from some of the figures[16] relating to the first General Election held under the Constitution in 1952. Out of a total population of 356 million and an adult population of 180 million, the number of voters enrolled was 173 million and of these no less than 88 million, *i.e.,* over 50 per cent of the enrolled voters, actually exercised their franchise. The orderliness with which eleven General Elections have been conducted speaks eloquently of the political attainment of the masses, though illiterate, of this vast sub-continent. In the eleventh General Election held in 1996, the number of persons on the electoral roll had come up to 550 million and the same came up to 67,14,87,930 in the 14th General Election in 2004.

No less creditable for the framers of the Constitution is the abolition of communal representation, which in its trail had brought in the bloody and lamentable partition of India. In the new Constitution there was no reservation of seats except for the Scheduled Castes and Scheduled Tribes and for the Anglo-Indians,—and that only for a temporary period (this period was 10 years in the original Constitution, which has been extended to 60 years, *i.e.*, up to 2010 A.D., by subsequent amendments of Art. 334).[17]

XIII. It has been stated at the outset, that the form of government introduced by *our* Constitution both at the Union and the States is the Parliamentary Government of the British type.[18] A primary reason for the choice of this system of government was that the people had a long experience of this system under the Government of India Acts,[19] though the British were very slow in importing its features to the fullest length.

The makers of *our* Constitution rejected the Presidential system of government, as it obtains in *America,* on the ground that under that system the Executive and the Legislatures are separate from and independent of each other,[20] which is likely to cause conflicts between them, which *our* infant democracy could ill afford to risk.

But though the British model of Parliamentary or Cabinet form of government was adopted, a hereditary monarch or ruler at the head could not be installed, because India had declared herself a 'Republic'. Instead of a monarch, therefore, an elected President was to be at the head of the Parliamentary system. In introducing this amalgam, the makers of *our* Constitution followed the *Irish* precedent.

Parliamentary Government combined with an elected President at the Head.

As in the Constitution of *Eire,* the Indian Constitution superimposes an elected President upon the Parliamentary system of responsible government. But though an elected President is the executive head of the Union, he is to act on the advice of his ministers, although whether he so acts according to the advice of his ministers is not questionable in the courts and there is no mode, short of impeachment, to remove the President if he acts contrary to the Constitution.

On the other hand, principle of ministerial responsibility to the Legislature, which under the English system rests on convention, is embodied in the express provisions of *our* Constitution [*Art.* 75(3)].

In the words of *our* Supreme Court,[21]

> "Our Constitution though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of government policy and its transmission into law, though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. . . In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England. . ."[21]

42nd Amendment, 1976.

But *our* Constitution is not an exact replica of the Irish model either. The Constitution of *Eire* lays down that the constitutional powers of the President can only be exercised by him on the advice of Ministers, *except* those which are left to his discretion by the Constitution itself. Thus, the Irish President has an absolute discretion to refuse dissolution of the Legislature to a defeated Prime Minister, contrary to the English practice and convention. But in the Indian Constitution there is no provision authorising the President to act 'in his discretion' on any matter. On the other hand, by amending

Art. 74(1), the 42nd Amendment Act has explicitly codified the proposition which the Supreme Court had already laid down in several decisions,[21] that the President "*shall,* in the exercise of his functions, act *in accordance with* such advice," *i.e.,* the advice tendered by the Council of Ministers.

44th Amendment, 1978.

The Janata Government has preferred not to disturb this contribution of the 42nd Amendment, except to empower the President by the 44th Amendment, 1978, to refer a matter back to the Council of Ministers, for reconsideration.

A Federal System with Unitary Bias.

XIV. Perhaps the most remarkable achievement of the Indian Constitution is to confer upon a federal system the strength of a unitary government. Though normally the system of government is federal, the Constitution enables the federation to transform itself into a unitary State (by the assumption of the powers of States by the Union),—in *emergencies* [*Part* XVIII].

Such a combination of federal and unitary systems in the same constitution is unique in the world. For a correct appreciation of this unique system it is necessary to examine the background upon which federalism has been introduced into India, in the light of the experience in other federal countries. This deserves a separate treatment [see Chap. 5, *post*].

Integration of Indian States.

XV. No less an outstanding feature of the new Constitution is the union of some 552 Indian States with the rest of India under the Constitution. Thus, the problem that baffled the framers of the Government of India Act, 1935, and ultimately led to the failure of its federal scheme, was solved by the framers of the Constitution with unique success. The entire sub-continent of India has been unified and consolidated into a compact State in a manner which is unprecedented in the history of this country.

The process by which this formidable task has been formed makes a story in itself.

Status of Indian States under the British Crown.

At the time of the constitutional reforms leading to the Government of India Act, 1935, the geographical entity known as India was divided into two parts—British India and the Indian States. While British India comprised the nine Governors' Provinces and some other areas administered by the Government of India itself, the Indian States comprised some 600 States which were mostly under the personal rule of the Rulers or proprietors. All the Indian States were not of the same order. Some of them were States under the rule of hereditary Chiefs, which had a political status even from before the Mahomedan invasion; others (about 300 in number) were Estates or Jagirs granted by the Rulers as rewards for services or otherwise, to particular individuals or families. But the common feature that distinguished these States from British India was that the Indian States, had *not* been *annexed* by the British Crown. So, while British India was under the direct rule of the Crown through its representatives and according to the statutes of Parliament and enactments of the Indian Legislatures,—the Indian

States were allowed to remain under the personal rule of their Chiefs and Princes, under the 'suzerainty' of the Crown, which was assumed over the entire territory of India when the Crown took over authority from the East India Company in 1858.

Incidents of Paramountcy.

The relationship between the Crown and the Indian States since the assumption of suzerainty by the Crown came to be described by the term '*Paramountcy*'. The Crown was bound by engagements of a great variety with the Indian States. A common feature of these engagements was that while the States were responsible for their own internal administration, the Crown accepted responsibility for their external relations and defence. The Indian States had no international life, and for *external* purposes, they were practically in the same position as British India. As regards *internal* affairs, the policy of the British Crown was normally one of non-interference with the monarchical rule of the Rulers, but the Crown interfered in cases of misrule and mal-administration, as well as for giving effect to its international commitments. So, even in the internal sphere, the Indian States had *no legal* right against non-interference.

Nevertheless, the Rulers of the Indian States enjoyed certain personal rights and privileges, and normally carried on their personal administration, unaffected by all political and constitutional vicissitudes within the neighbouring territories of British India.

Place of Indian States in the Federal Scheme proposed by the Government of India Act, 1935.

The Government of India Act, 1935 envisaged a federal structure for the whole of India, in which the Indian States could figure as units, together with the Governors' Provinces. Nevertheless, the framers of the Act differentiated the Indian States from the Provinces in two material respects, and this differentiation ultimately proved fatal for the scheme itself. The two points of difference were—(a) While in the case of the Provinces accession to the Federation was compulsory or automatic,—in the case of an Indian State it was voluntary and depended upon the option of the Ruler of the State. (b) While in the case of the Provinces, the authority of the Federation over the Provinces (executive as well as legislative) extended over the whole of the federal sphere chalked out by the Act,—in the case of the Indian States, the authority of the Federation could be limited by the Instrument of Accession and all residuary powers belonged to the State. It is needless to elaborate the details of the plan of 1935, for, as has been stated earlier, the accession of the Indian States to the proposed Federation never came true, and this Part of that Act was finally abandoned in 1939, when World War II broke out.

When Sir Stafford Cripps came to India with his Plan, it was definitely understood that the Plan proposed by him would be confined to settling the political destinies of British India and that the Indian States would be left free to retain their separate status.

Proposal of the Cabinet Mission.

But the Cabinet Mission supposed that the Indian States would be ready to co-operate with the new development in India. So, they recommended that there should be a Union of India, embracing both British India and the States, which would deal only with Foreign Affairs, Defence and Communications, while the State would retain all powers other than these.

Lapse of Paramountcy under the Indian Independence Act.

When the Indian Independence Act, 1947, was passed, it declared the lapse of suzerainty (paramountcy) of the Crown, in s. 7(1)(b) of the Act, which is worth reproduction:

> '7. (1) As from the appointed day—
>
> (*b*) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at the date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority, or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise; and
>
> *Provided* that notwithstanding anything in paragraph (*b*). . . of this sub-section, effect shall, as nearly as may be, continue to be given to the provision of any such agreement as is therein referred to which relate to customs, transit and communications, posts and telegraphs, or other like matters, until the provisions in question are denounced by the Rulers of the Indian States. . . on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements.'

But though paramountcy lapsed and the Indian States regained their position which they had prior to the assumption of suzerainty by the Crown, most of the States soon realised that it was no longer possible for them to maintain their existence independent of and separate from the rest of the country, and that it was in their own interests necessary to accede to either of the two Dominions of India and Pakistan. Of the States situated within the geographical boundaries of the Dominion of India, all (numbering 552) save Hyderabad, Kashmir, Bahawalpur, Junagadh and the N.W.F. States (Chitral, Phulra, Dir, Swat and Amb) had acceded to the Dominion of India by the 15th August, 1947, *i.e.,* before the 'appointed day' itself. The problem of the Government of India as regards the States after the accession was two-fold:

(a) Shaping the Indian States into sizeable or viable administrative units, and (b) fitting them into the constitutional structure of India.

(A) The first objective was sought to be achieved by a three-fold process of integration (known as the 'Patel scheme' after Sardar Vallabhbhai Patel, Minister in-charge of Home Affairs)—

Integration and merger.

(i) 216 States were merged into the respective Provinces, geographically contiguous to them. These merged States were included in the territories of the States in Part B in the First Schedule of the Constitution. The process of merger started with the merger of Orissa and Chhattisgarh States with the then Province of Orissa on January 1, 1948, and the last instance was the merger of Cooch-Behar with the State of West Bengal in January, 1950.

(ii) 61 States were converted into Centrally administered areas and included in Part C of the First Schedule of the Constitution. This form of integration was resorted to in those cases in which, for administrative, strategic or other special reasons, Central control was considered necessary.

(iii) The third form of integration was the consolidation of groups of States into new viable units, known as Union of States. The first Union formed was the Saurashtra Union consolidating the Kathiawar States and many other States (February 15, 1948), and the last one was the Union of Travancore-Cochin, formed on July 1, 1949. As many as 275 States were thus integrated into 5 Unions—Madhya Bharat, Patiala and East Punjab States Union, Rajasthan, Saurashtra and Travancore-Cochin. *These were included in the States in Part B* of the First Schedule. The other 3 States included in Part B were—Hyderabad, Jammu and Kashmir and Mysore. The cases of Hyderabad and Jammu and Kashmir were peculiar. Jammu and Kahsmir acceded to India on October 26, 1947, and so it was included as a State in Part B, but the Government of India agreed to take the accession subject to confirmation by the people of the State, and a Constituent Assembly subsequently confirmed it, in November, 1956. Hyderabad did not formally accede to India, but the Nizam issued a Proclamation recognising the necessity of entering into a constitutional relationship with the Union of India and accepting the Constitution of India subject to ratification by the Constituent Assembly of that State, and the Constituent Assembly of that State ratified this. As a result, Hyderabad was included as a State in Part B of the First Schedule of the Constitution.

(B) We have so far seen how the States in Part B were formed as viable units of administration,—being the residue of the bigger Indian States, left after the smaller States had been merged in the Provinces or converted into Centrally Administered Areas. So far as the latter two groups were concerned, there was no problem in fitting them into the body of the Constitution framed for the rest of India. There was an agreement between the Government of India and the Ruler of each of the States so merged, by which the Rulers voluntarily agreed to the merger and ceded all powers for the governance of the States to the Dominion Government, reserving certain personal rights and privileges for themselves.

But the story relating to the States in Part B is not yet complete. At the time of their accession to the Dominion of India in 1947, the States had acceded only on three subjects, *viz.*, Defence, Foreign Affairs and Communications. With the formation of the Unions and under the influence of political events, the Rulers found it beneficial to have a closer connection with the Union of India and all the Rajpramukhs of the Unions as well as the Maharaja of Mysore, signed revised Instruments of Accession by which all these States acceded to the Dominion of India in respect of *all* matters included in the Union and Concurrent Legislative Lists, except only those relating to taxation. Thus, the States in Part B were brought at par with the States in Part A, subject only to the differences embodied in Art. 238 and the supervisory powers of the Centre for the transitional period of 10 years [*Art.* 371]. Special provisions were made only for Kashmir [*Art.* 370] in view of its special position and problems. That article makes special provisions for the partial application of the Constitution of India to that State, with the concurrence of the Government of that State.

It is to be noted that the Rajpramukhs of the five Unions as well as the Rulers of Hyderabad, Mysore, Jammu and Kashmir all adopted the Constitution of India, by Proclamations.

Reorganisation of States.

The process of integration culminated in the Constitution (7th Amendment) Act, 1956, which abolished Part B States as a class and included *all the States in Part A and B in one list.*[22] The special provisions in the Constitution relating to Part B States were, consequently, omitted. The Indian States thus lost their identity and became part of one uniform political organisation embodied in the Constitution of India.[23]

The process of reorganisation is continuing still and the recent trend is towards conceding the demands of smaller units which were previously Part B States, Union Territories or autonomous parts of States, by conferring upon them the status of a 'State', *e.g.,* Nagaland, Meghalaya, Himachal Pradesh, Manipur, Tripura, Mizoram, Goa. Delhi has been made the National Capital Territory. This process will be further elaborated in Chap. 6 (Territory of India), *post.*

Outstanding and 'basic' features of the Constitution.

Before closing this Chapter, however, it should be pointed out that since the observations in the case of *Golak Nath,*[24] culminating with *Keshavananda,*[25] the Supreme Court had been urging that there are certain 'basic' features of the Constitution, which were immune from the power of amendment conferred by Art. 368, which, according to the Court, was subject to 'implied' limitations. On the other hand, the Indira Government had been attempting to thwart this doctrine by successive amendments of Art. 368, starting with the 24th Amendment, 1971, and ending with 42nd Amendment Act, 1976, so as to obviate any such conclusion by the Supreme Court.[26] The Court has, however, adhered to its view notwithstanding any of these amendments.[27] The present Chapter does not enter into that controversy, which will be dealt with in Chap. 10 (Procedure for Amendment), *post.* [See that Chapter as to the list of basic feature].

The comparative study of any Constitution will reveal that it has certain prominent features which distinguish it from other Constitutions. It is those prominent features which have been summarised in this Chapter by way of introducing the reader to the various provisions of the Indian Constitution.

REFERENCES

1. VII C.A.D., pp. 35-38.
2. VII C.A.D., 2, 242; XI C.A.D., 613, 616.
3. The Constitution of the United States, with all its amendments up to date, consists of not more than 7,000 words.
4. C.A.D., Vol. XI, pp. 839-40.
5. Of course, some of these provisions have been eliminated by the Constitution (7th Amendment) Act, 1956, which abolished the distinction between different classes of States.
6. DR. RAJENDRA PRASAD, C.A.D., Vol. X, p. 891.
7. The original title of this Act was the 'Untouchability (Offences) Act, 1955'. It has been extensively widened and made more rigorous, and renamed as the 'Protection of Civil Rights Act, 1955', by Act 106 of 1976.
8. WHEARE, *Modern Constitutions,* p. 143.
9. C.A.D. dated 8-11-1948, pp. 322-23.
10. JENNINGS, *Some Characteristics of the Indian Constitution,* 1953, pp. 2, 6, 25-26.

11. The major changes made by the 42nd Amendment Act have been elaborately and critically surveyed in the Author's *Constitution Amendment Acts,* pp. 117-34, which should be read along with this book.
12. C.A.D., Vol. VII, p. 293.
13. *G.C. Kanungo* v. *State of Orissa,* (1995) 5 S.C.C. 96 (paras 17 and 18) : A.I.R. 1995 S.C. 1655; *L. Chandra Kumar* v. *Union of India,* (1997) 3 S.C.C. 261 (paras 62 and 76) : A.I.R. 1997 S.C. 1125 and *State of A.P.* v. *K. Mohanlal,* (1998) 5 S.C.C. 468 (para 9).
14. *Maneka Gandhi* v. *Union of India,* AIR 1978 S.C. 597.
15. *Minerva Mills* v. *Union of India,* AIR 1980 S.C. 1789 (paras 21-26).
16. Report of the First General Elections in India (1951-52), Vol. I.
17. *Vide* the Constitution (79th Amendment) Act, 1999.
18. Prime Minister Nehru in the Lok Sabha, on 28-3-1957.
19. IV C.A.D., 578 (Sardar Patel).
20. VII C.A.D., 984 (Munshi).
21. *Ram Jawaya* v. *State of Punjab,* (1955) 2 S.C.R. 225; *Shamser Singh* v. *State of Punjab,* AIR 1974 S.C. 2192.
22. As will be more fully explained in a later Chapter, the number of the States,—all of one category,—is 28 at the end of 2000. Besides, there are 7 Union Territories.
23. It should be mentioned, in this context, that the last vestiges of the princely order in India have been done away with by the repeal of Arts. 291 and 362, and the insertion of Art. 363A, by the Constitution (26th Amendment) Act, 1971 (w.e.f. 28-12-1971), which abolished the Privy Purse granted to the Rulers of the erstwhile Indian States and certain other personal privileges accorded to them under the Constitution—as a result of which the heads of these pre-Independence Indian States have now been brought down to a level of equality with other citizens of India.
24. *Golak Nath* v. *State of Punjab,* AIR 1967 S.C. 1643.
25. *Keshavananda* v. *State of Kerala,* AIR 1973 S.C. 1461.
26. The Janata Government's efforts to enshrine the 'basic features theory' in the Constitution itself, by requiring a *referendum* to amend four 'basic features', failed owing to Congress opposition to the relevant amendments of Art. 368 of the Constitution, as proposed by the 45th Amendment Bill, 1978. The four basic features mentioned in that Bill were—(i) Secular and democratic character of the Constitution; (ii) Fundamental Rights under Part III; (iii) Free and fair elections to the Legislatures; (iv) Independence of the Judiciary.
27. *Minerva Mills* v. *Union of India,* AIR 1980 S.C. 1789 (paras 21-26, 28, 91, 93-94); *Sampat* v. *Union of India,* AIR 1987 S.C. 386; *Union of India* v. *Raghubir,* AIR 1989 S.C. 1933 (para 7).

CHAPTER 5

NATURE OF THE FEDERAL SYSTEM

India, a Union of States.

ARTICLE 1(1) of *our* Constitution says—"India, that is Bharat, shall be a Union of States."

While submitting the Draft Constitution, Dr. Ambedkar, the Chairman of the Drafting Committee, stated that "although its Constitution may be federal in structure", the Committee had used the term "Union" because of certain advantages,[1] These advantages, he explained in the Constituent Assembly,[2] were to indicate two things, *viz.,* (a) that the Indian federation is not the result of an agreement by the units, and (b) that the component units have no freedom to secede from it.

The word 'Union', of course, does not indicate any particular type of federation, inasmuch as it is used also in the Preamble of the Constitution of the United States—the model of federation; in the Preamble of the British North America Act (which, according to Lord HALDANE, did not create a true federation at all); in the Preamble to the Union of South Africa Act, 1909, which patently set up a unitary Constitution; and even in the Constitution of the U.S.S.R. (1977), which formally acknowledges a right of secession [*Art.* 72] to each Republic, *i.e.,* unit of the Union.[3]

We have, therefore, to examine the provisions of the Constitution itself, apart from the label given to it by its draftsman, to determine whether it provides a federal system as claimed by Dr. Ambedkar, particularly in view of the criticisms (as will be presently seen) levelled against its federal claim by some foreign scholars.

Different types of Federal Constitutions in the modern World.

The difficulty of any treatment of federalism is that there is no agreed definition of a federal State. The other difficulty is that it is habitual with scholars on the subject to start with the model of the *United States,* the oldest (1787) of all federal Constitutions in the world, and to exclude any system that does not conform to that model from the nomenclature of 'federation'. But numerous countries in the world have, since 1787, adopted Constitutions having federal features and, if the strict historical standard of the United States be applied to all these later Constitutions, few will stand the test of federalism save perhaps Switzerland and Australia. Nothing is, however, gained by excluding so many recent Constitutions from the federal class, for, according to the traditional classification followed by political scientists, Constitutions are either unitary or federal. If, therefore, a Constitution partakes of some features of both types, the only alternative is to analyse those features and to ascertain whether it is *basically* unitary or federal, although it may have subsidiary variations. A liberal attitude towards the question of federalism is, therefore, inevitable particularly in view of the fact that recent experiments in the world of Constitution-making are departing more and more from the 'pure' type of either unitary or a federal system. The Author's views on this subject, expressed in the previous Editions of this book as well as in the *Commentary on the Constitution of India,*[4] now find support from the categorical assertion of a research worker[5] on the subject of federalism (who happens to be an American himself), that the question whether a State is federal or unitary is one of degrees and the answer will depend upon "how many federal features it possesses". Another American scholar[6] has, in the same strain, observed that federation is more a 'functional' than an 'institutional' concept and that any theory which asserts that there are certain inflexible characteristics without which a political system cannot be federal ignores the fact "that institutions are not the same things in different social and cultural environments".

Indian Constitution basically Federal, with unitary features.

To anticipate the Author's conclusion, the constitutional system of India is *basically* federal, but, of course, with striking unitary features.[7] In order to come to this conclusion, we have to formulate the essential minimal features of a federal system as to which there is common agreement amongst political scientists.

Essential features of a Federal polity.

Though there may be difference amongst scholars in matters of detail, the consensus of opinion is that a federal system involves the following essential features:

(i) *Dual Government.* While in a unitary State, there is only one Government, namely the national Government, in a federal State, there are two Governments,—the national or federal Government and the Government of each component State.

Though a unitary State may create local sub-divisions, such local authorities enjoy an autonomy of their own but exercise only such powers as are from time to time delegated to them by the national government and it is competent for the national Government to revoke the delegated powers or any of them at its will.

A federal State, on the other hand, is the fusion of several States into a single State in regard to matters affecting common interests, while each component State enjoys autonomy in regard to other matters. The component States are not mere delegates or agents of the federal Government but both the Federal and State Governments draw their authority from the same source, *viz.*, the Constitution of the land. On the other hand, a component State has no right to secede from the federation at its will. This distinguishes a federation from a confederation.

(ii) *Distribution of Powers.* It follows that the very object for which a federal State is formed involves a division of authority between the Federal Government and the States, though the method of distribution may not be alike in the federal Constitutions.

(iii) *Supremacy of the Constitution.* A federal State derives its existence from the Constitution, just as a corporation derives its existence from the grant of a statute by which it is created. Every power—executive, legislative, or judicial—whether it belongs to the federation or to the component States, is subordinate to and controlled by the Constitution.

(iv) *Authority of Courts.* In a federal State the legal supremacy of the Constitution is essential to the existence of the federal system. It is essential to maintain the division of powers not only between the coordinate branches of the government, but also between the Federal Government and the States themselves. This is secured by vesting in the Courts a final power to interpret the Constitution and nullify an action on the part of the Federal and State Governments or their different organs which violates the provisions of the Constitution.

The Supreme Court has observed that Indian Constitution is basically federal in form and is marked by the traditional characteristics of a federal system, namely, supremacy of the Constitution, division of power between the Union and the States and existence of an independent judiciary.[8]

Not much pains need to be taken to demonstrate that the political system introduced by *our* Constitution possesses all the aforesaid essentials of a federal polity. Thus, the Constitution is the supreme organic law of *our* land, and both the Union and the State Governments as well as their respective organs derive their authority from the Constitution, and it is not competent for the States to secede from the Union. There is a division of legislative and administrative powers between the Union and the State Governments and the Supreme Court stands at the head of *our* Judiciary to jealously guard this distribution of powers and to invalidate any action which violates the limitations imposed by the Constitution. This jurisdiction of the Supreme Court may be resorted to not only by a person[9] who has been affected by a Union or State law which, according to him, has violated the constitutional distribution of powers but also by the Union and the States themselves by bringing a direct action against each other, before the Original Jurisdiction of the Supreme Court under Art. 131.[10] It is because of these basic federal features that our Supreme Court has described the Constitution as 'federal'.[11]

Peculiar features of Indian Federalism.

But though *our* Constitution provides these essential features of a federation, it differs from the typical federal systems of the world in certain fundamental respects:

(A) *The Mode of formation.* A federal union of the American type is formed by a voluntary agreement between a number of sovereign and independent States, for the administration of certain affairs of general concern.

But there is an alternative mode of the *Canadian* type (if Canada is admitted into the family of federations), namely, that the provinces of a unitary State may be transformed into a federal union to make themselves autonomous. The provinces of Canada had no separate or independent existence apart from the colonial Government of Canada, and the Union was not formed by any agreement between them, but was imposed by a British statute, which withdrew from the Provinces all their former rights and then re-divided them between the Dominion and the Provinces. Though the Indian federation resembles the Canadian federation in its centralising tendency, it even goes further than the Canadian precedent. The federalism in India is not a matter of administrative convenience, but one of principle.[12]

India had a thoroughly centralised unitary constitution until the Government of India Act, 1935. The Provincial Governments were virtually the agents of the Central Government, deriving powers by delegation from the latter (see pp. 1-8, *ante*).

To appreciate the mode of formation of federation in India, we must go back to the Government of India Act, 1935, which for the first time introduced the federal concept, and used the expression 'Federation of India' (s. 5) in a Constitution Act relating to India, since the Constitution has simply continued the federal system so introduced by the Act of 1935, so far as the Provinces of British India are concerned. The foundation for a federal set-up for the nation was laid in the Govt. of India Act, 1935. Though in every respect the distribution of legislative power between the Union and the States as envisaged in the 1935 Act has not been adopted in the Constitution, but the basic framework is the same.[13] The Supreme Court observed that India has adopted for itself a loose federal structure as it is an indestructible Union of destructible units.[14]

Federation as envisaged by the Government of India Act, 1935.

By the Act of 1935, the British Parliament set up a federal system in the same manner as it had done in the case of *Canada*, *viz.*, "by creating autonomous units and combining them into a federation by one and the same Act". All powers hitherto exercised in India were resumed by the Crown and redistributed between the Federation and the Provinces by a direct grant. Under this system, the Provinces derived their authority directly from the Crown and exercised legislative and executive powers, broadly free from Central control, within a defined sphere. Nevertheless, the Centre retained control through 'the Governor's special responsibilities' and his obligation to exercise his individual judgment and discretion in certain matters, and the power of the Centre to give direction to the Provinces.[15]

The peculiarity of thus converting a unitary system into a federal one can be best explained in the words of the Joint Parliamentary Committee on Indian Reforms:

> "Of course in thus converting a unitary State into a federation we should be taking a step *for which there is no exact historical* precedent. Federations have commonly resulted from an agreement between independent or, at least, autonomous Governments, surrendering a defined part of their sovereignty or autonomy to a new central organism. At the present moment the British Indian Provinces are not even autonomous for they are subject to both administrative and legislative control of the Government and such authority as they exercise has been in the main devolved upon them under a statutory rule-making power by the Governor-General in Council. We are faced with the necessity of *creating autonomous units and combining them* into a federation by one and the same Act."

Not the result of a compact.

It is well worth remembering this peculiarity of the origin of the federal system in India. Neither before nor under the Act of 1935, the Provinces were in any sense 'sovereign' States like the States of the American Union. The Constitution, too, has been framed by the 'people of India' assembled in the Constituent Assembly, and the Union of India cannot be said to be the result of any *compact* or agreement between autonomous States.[2] So far as the Provinces are concerned, the progress had been from a unitary to a federal organisation, but even then, this has happened not because the Provinces desired to become autonomous units under a federal union, as in Canada. The Provinces, as just seen, had been artificially made autonomous, within a defined sphere, by the Government of India Act, 1935. What the makers of the Constitution did was to associate the Indian States with these autonomous Provinces into a federal union, which the Indian States had refused to accede to, in 1935.

Some amount of homogeneity of the federating units is a condition for their desire to form a federal union. But in India, the position has been different. From the earliest times, the Indian States had a separate political entity, and there was little that was common between them and the Provinces which constituted the rest of India. Even under the federal scheme of 1935 the Provinces and the Indian States were treated differently; the accession of the Indian States to the system was voluntary while it was compulsory for the Provinces, and the powers exercisable by the Federation over the Indian States were also to be defined by the Instruments of Accession. It is because it was optional with the Rulers of the Indian States that they refused to join the federal system of 1935. They lacked the 'federal sentiment' (*Dicey*), that is, the desire to form a federal union with the rest of India. But, as already pointed out, the political situation changed with the lapse of paramountcy of the British Crown as a result of which most of the Indian States acceded to the Dominion of India on the eve of the Independence of India.

The credit of the makers of the Constitution, therefore, lies not so much in bringing the Indian States under the federal system but in placing them, as much as possible, on the same footing as the other units of the federation, under the same Constitution. In short, the survivors of the old Indian States (States in Part B[16] of the First Schedule) were, with minor exceptions, placed under the same political system as the old Provinces (States in Part A[16]). The integration of the units of the two categories has eventually been completed by eliminating the separate entities of States in Part A and States in Part B and replacing them by one category of States, by the Constitution (7th Amendment) Act, 1956.[16]

(B) *Position of the States in the Federation.* In the *United States,* since the States had a sovereign and independent existence prior to the formation of the federation, they were reluctant to give up that sovereignty any further than what was necessary for forming a national government for the purpose of conducting their common purposes. As a result, the Constitution of the federation contains a number of safeguards for the protection of 'State rights', for which there was no need in *India,* as the States were not 'sovereign' entities before. These points of difference deserve particular attention:

(i) While the *residuary* powers are reserved to the States by the American Constitution, these are assigned to the Union by *our* Constitution [*Art.* 248].

This alone, of course, is not sufficient to put an end to the federal character of our political system, because it only relates to the *mode* of distribution of powers. *Our* Constitution has simply followed the *Canadian* system in vesting the residuary power in the Union.

No State excepting Kashmir, can draw its own Constitution.

(ii) While the Constitution of the *United States of America* merely drew up the constitution of the national government, leaving it "in the main (to the State) to continue to preserve their original Constitution", the Constitution of *India* lays down the constitution for the States as well, and, no State, save Jammu and Kashmir, has a right to determine its own (State) constitution.

(iii) In the matter of amendment of the Constitution, again, the part assigned to the State is minor, as compared with that of the Union. The doctrine underlying a federation of the *American* type is that the union is the result of an agreement between the component units, so that no part of the Constitution which embodies the compact can be altered without the consent of the covenanting parties. This doctrine is adopted, with variations, by most of the federal systems.

But in *India,* except in a few specified matters affecting the federal structure (see Chap. 10, *post*), the States need not even be consulted in the matter of amendment of the bulk of the Constitution, which may be effected by a Bill in the Union Parliament, passed by a special majority.

(iv) Though there is a division of powers between the Union and the States, there is provision in *our* Constitution for the exercise of control by the Union both over the administration and legislation of the States. Legislation by a State shall be subject to disallowance by the President, when reserved by the Governor for his consideration [*Art.* 201]. Again, the Governor of a State shall be appointed by the President of the Union and shall hold office 'during the pleasure' of the President [*Arts.* 155-156]. These ideas are repugnant to the Constitution of the United States or of Australia, but are to be found in the *Canadian* Constitution.

(v) The *American* federation has been described by its Supreme Court as "an indestructible Union composed of indestructible States".[17]

It comprises two propositions—

(a) The Union cannot be destroyed by any State seceding from the Union at its will.[18]

(b) Conversely, it is not possible for the federal Government to redraw the map of the United States by forming new States or by altering the boundaries of the States as they existed at the time of the compact without the *consent* of the Legislatures of the States concerned. The same principle is adopted in the *Australian* Constitution to make the Commonwealth "indissoluble", with the further safeguard superadded that a popular referendum is required in the affected State to alter its boundaries.

(a) It has been already seen that the first proposition has been accepted by the makers of *our* Constitution, and it is not possible for the States of the Union of India, to exercise any right of secession. It should be noted in this context that by the 16th Amendment of the Constitution in 1963, it has been made clear that even advocacy of secession will not have the protection of the freedom of expression.[19]

No right to secede.

But consent of a State is not required for altering its boundaries by Parliament.

(b) But just the contrary of the second proposition has been embodied in *our* Constitution. Under *our* Constitution, it is possible for the Union Parliament to reorganise the States or to alter their boundaries, by a simple majority in the ordinary process of legislation [*Art.* 4(2)]. The Constitution does not require that the *consent* of the Legislature of the States is necessary for enabling Parliament to make such laws; only the President has to 'ascertain' the views of the Legislature of the affected States to recommend a Bill for this purpose to Parliament. Even this obligation is not mandatory insofar as the President is competent to fix a time-limit within which a State must express its views, if at all [Proviso to *Art.* 3, as amended]. In the Indian federation, thus, the States are not "indestructible" units as in the *U.S.A.* The ease with which the federal organisation may be reshaped by an ordinary legislation by the Union Parliament has been demonstrated by the enactment of the States Reorganisation Act, 1956, which reduced the number of States from 27 to 14 within a period of six years from the commencement of the Constitution. The same process of disintegration of existing States, effected by unilateral legislation by Parliament, has led to the formation, subsequently, of several new States—Gujarat, Nagaland, Haryana, Karnataka, Meghalaya, Himachal Pradesh, Manipur, Sikkim, Tripura, Mizoram, Arunachal Pradesh, Goa, Chhattisgarh, Uttarakhand, Jharkand.

It is natural, therefore, that questions might arise in foreign minds as to the nature of federalism introduced by the Indian Constitution.

(vi) Not only does the Constitution offer no guarantee to the States against affecting their territorial integrity without their consent,—there is no theory of 'equality of State rights' underlying the federal scheme in *our* Constitution, since it is not the result of any agreement between the States.

One of the essential principles of *American* federalism is the equality of the component States under the Constitution, irrespective of their size or population. This principle is reflected in the equality of representation of the States in the upper House of the Federal Legislature (*i.e.*, in the Senate),[20] which is supposed to safeguard the status and interests of the States in the federal organisation. To this is superadded the guarantee that no State may, without its consent, be deprived of its equal representation in the Senate [*Art.* V].

No equality of State representation.

Under *our* Constitution, there is no equality of representation of the States in the Council of States. As given in the Fourth Schedule, the number of members for the several States varies from 1 to 31. In view of such composition of the Upper Chamber, the federal safeguard against the interests of the lesser States being overridden by the interests of the larger or more populated States is absent under *our* Constitution. Nor can *our* Council of States be correctly described as a federal Chamber insofar as it contains a nominated element of twelve members as against 238 representatives of the States and Union Territories.

Status of Sikkim.

(vii) Another novel feature introduced into the Indian federalism was the admission of Sikkim as an 'associate State', without being a *member* of the Union of India, as defined in Art. 1, which was made possible by the insertion of Art. 2A into the Constitution, by the Constitution (35th Amendment) Act, 1974.

This innovation was, however, shortlived and its legitimacy has lost all practical interest since all that was done by the 35th Amendment Act, 1974, has been undone by the 36th Amendment Act, 1975, by which Sikkim has been admitted into the Union of India, *as a full-fledged State* under the First Schedule with effect from 26th April, 1975 (see under Chap. 6, *post*). The original federal scheme of the Indian Constitution, comprising States and the Union Territories, has thus been left unimpaired.

Of course, certain special provisions have been laid down in the new Art. 371F, as regards Sikkim, to meet the special circumstances of that State. Article 371G makes certain special provisions relating to the State of Mizoram, while Arts. 371H and 371I insert special provisions for Arunachal Pradesh and Goa.

(C) *Nature of the Polity.* As a radical solution of the problem of reconciling national unity with 'State rights', the framers of the *American* Constitution made a logical division of everything essential to sovereignty and created a dual polity, with a dual citizenship, a double set of officials and a double system of Courts.

No double citizenship.

(i) An *American* is a citizen not only of the State in which he resides but also of the United States, *i.e.,* of the federation, under different conditions; and both the federal and State Governments, each independent of the other, operate *directly* upon the citizen who is thus *subject to two Governments, and owes allegiance to both.* But the *Indian* Constitution, like the Canadian, does not introduce any double citizenship, but one citizenship, *viz.,*—the citizenship of India [*Art.* 5], and birth or residence in a particular State does not confer any separate status as a citizen of that State.

No division of public services.

(ii) As regards officials similarly, the federal and State Governments in the *United States,* have their own officials to administer their respective laws and functions. But there is no such division amongst the public officials in India. The majority of the public servants are employed by the States, but they administer both the Union and the State laws as are applicable to their respective States by which they are employed. *Our* Constitution provides for the creation of All-India Services, but they are to be common to the Union and the States [*Art.* 312]. Members of the Indian Administrative Service, appointed by the Union, may be employed either under some Union Department (say, Home or Defence) or under a State Government, and their services are transferable, and even when they are employed under a Union Department, they have to administer both the Union and State laws as are applicable to the matter in question. But even while serving under a State, for the time being, a member of an all-India Service can be dismissed or removed only by the Union Government, even though the State Government is competent to initiate disciplinary proceedings for that purpose

No dual system of Courts.

(iii) In the *U.S.A.,* there is a bifurcation of the Judiciary as between the Federal and State Governments. Cases arising out of the federal Constitution and federal laws are tried by the federal Courts, while State Courts deal with cases arising out of the State Constitution and State laws. But in *India,* the same system of Courts, headed by the Supreme Court, will administer both the Union and State laws as they are applicable to the cases coming up for adjudication.

(iv) The machinery for election, accounts and audit is also similarly integrated.

(v) The Constitution of India empowers the Union to entrust its executive functions to a State, by its consent [*Art.* 258], and a State to entrust its executive functions to the Union, similarly [*Art.* 258A]. No question of 'surrender of sovereignty' by one Government to the other stands in the way of this smooth co-operative arrangement.

(vi) While the federal system is prescribed for normal times, the Indian Constitution enables the federal government to acquire the strength of a unitary system in *emergencies.* While in normal times the Union Executive is entitled to give directions to the State Governments in respect of specified matters, when a Proclamation of Emergency is made, the power to give directions extends to *all* matters and the legislative power of the Union extends to State subjects [*Arts.* 353, 354, 357]. The wisdom of these emergency provisions (relating to *external* aggression, as distinguished from 'internal disturbance') has been demonstrated by the fact that during the Chinese aggression of 1962 or the Pakistan aggression of 1965, India could stand as one man, pooling all the resources of the States, notwithstanding the federal organisation.

(vii) Even in its normal working, the federal system is given the strength of a unitary system—

Union control in normal times.

(a) By endowing the Union with as much exclusive powers of legislation as has been found necessary in other countries to meet the ever-growing national exigencies, and, over and above that, by enabling the Union Legislature to take up some subject of State competence, if required in the national interest'. Thus, even apart from emergencies, the Union Parliament may assume legislative power (though temporarily) over any subject included in the State List,[21] if the Council of States (Second Chamber of Parliament) resolves, by a two-thirds vote, that such legislation is necessary in the 'national interest' [*Art.* 249]. There is, of course, a federal element in this provision inasmuch as such expansion of the power of the Union into the State sphere is possible only with the consent of the Council of States where the States are represented. But, in actual practice, it will mean an additional weapon in the hands of the Union *vis-a-vis* the States so long as the same party has a solid majority in both the Houses of the Union Parliament.

Strong central bias.

Even though there is a distribution of powers between the Union and the States as under a federal system, the distribution has a strong Central bias and the powers of the States are hedged in with various restrictions which impede their sovereignty even within the sphere limited to them by the distribution of powers basically provided by the Constitution.

(b) By empowering the Union Government to issue directions upon the State Governments to ensure due compliance with the legislative and administrative action of the Union [*Arts.* 256-257], and to supersede a State Government which refuses to comply with such directions [*Art.* 365].

(c) By empowering the President to withdraw to the Union the executive and legislative powers of a State under the Constitution if he is, *at any time,* satisfied that the administration of the State cannot be carried on in the normal manner in accordance with the provisions of Constitution, owing to political or other reasons [*Art.* 356]. From the federal standpoint, this seems to be anomalous inasmuch as the Constitution-makers did not consider it necessary to provide for any remedy whatever for a similar breakdown of the constitutional machinery at the Centre. Hence, Panikkar is justified in observing—"The Constitution itself has created a kind of paramountcy for the Centre by providing for the suspension of State Governments and the imposition of President's rule under certain conditions such as the breakdown of the administration". *Secondly,* the power to suspend the constitutional machinery may be exercised by the President, not only on the report of the Governor of the State concerned but also *sou motu,* whenever he is satisfied that a situation calling for the exercise of this power has arisen. It is thus a *coercive* power available to the Union against the units of the federation.

A critique of the Federal System.

But though the above scheme seeks to avoid the demerits of the federal system, there is perhaps such an emphasis on the strength of the Union government as affects the federal principle as it is commonly understood. Thus, a foreign critic (Prof. Wheare)[22] was led to observe that the Indian Constitution provides—

> "a system of Government which is quasi-federal . . .a *Unitary State* with *subsidiary federal features rather than a Federal State with subsidiary unitary features.*"

In his later work in Modern Constitutions[23] he puts it, generically, thus—

> "In the class of quasi-federal Constitution it is *probably proper* to include the Indian Constitution of 1950. . . ."

Prof. Alexandrowicz[24] has taken great pains to combat the view that the Indian federation is 'quasi-federation'. He seems to agree with this Author,[25] when he says that "India is a case *sui generis*". This is in accord with the Author's observation that—

> "the Constitution of India is neither purely federal nor purely unitary but is a combination of both. It is a Union or composite State of a novel type. It enshrines the principle that in spite of federalism the national interest ought to be paramount."[25]

In fact, anybody who impartially studies the Indian Constitution from close quarters and acknowledges that Political Science today admits of different variations of the federal system cannot but observe that the Indian system is 'extremely federal',[26] or that it is a 'federation with strong centralising tendency'.[27]

Strictly speaking, any deviation from the American model of pure federation would make a system quasi-federal, and, if so, the Canadian system, too, can hardly escape being branded as quasi-federal. The difference between the *Canadian* and the *Indian* system lies in the degree and extent of the unitary emphasis. The real test of the federal character of a political structure is, as Prof. Wheare has himself observed[22]—

> "That, however, is what appears on paper only. It remains to be seen whether *in actual practice* the federal features entrench or strengthen themselves as they have in Canada, or whether the strong trend towards centralisation which is a feature of most Western Governments in a world of crises, will compel these federal aspects of the Constitution to wither away."

The working of federalism in India.

A survey of the actual working of *our* Constitution for the last 59 years would hardly justify the conclusion that, even though the unitary bonds have in some respects been further tightened, the federal features have altogether 'withered away'.

Some scholars in India[28] have urged that the unitary bias of *our* Constitution has been accentuated, in its actual working, by two factors so much so that very little is left of federalism. These two factors are—(a) the overwhelming financial power of the Union and the utter dependence of the States upon Union grants for discharging their functions; (b) the comprehensive sweep of the Union Planning Commission, set up under the concurrent power over planning. The criticism may be justified in point of degree, but not in principle, for two reasons—

(i) Both these controls are aimed at securing a uniform development of the country as a whole. It is true that the bigger States are not allowed to appropriate all their resources and the system of assignment and distribution of tax resources by the Union [*Arts.* 269, 270, 272] means the dependence of the States upon the Union to a large extent. But, left alone, the stronger and bigger States might have left the smaller ones lagging behind, to the detriment of our national strength.

(ii) Even in a country like the United States, such factors have, in practice, strengthened the national Government to a degree which could not have been dreamt of by the fathers of the Constitution. Curiously enough, the same complaint, as in India, has been raised in the United States. Thus, of the centralising power of federal grants, an American writer[29] has observed—

> "Here is an attack on federalism, so subtle that it is scarcely realised . . . Control of economic life and of these social services (*viz.*, unemployment, old-age, maternity and child welfare) were the two major functions of a State and local governments. The first has largely passed into national hands; the second seems to be passing. If these both go, what we shall have left of State autonomy will be a hollow shell, a symbol."

In fact, the traditional theory of mutual independence of the two governments,—federal and States, has given way to "co-operative federalism' in most of the federal countries today.[30]

An American scholar explains the concept of 'co-operative federalism' in these words[30]—

> ". . . the practice of administrative co-operation between general and regional governments, the partial *dependence* of the regional governments *upon payments* from the general governments, and the fact that the general governments, by the use of *conditional* grants, frequently promote developments in matters which are *constitutionally assigned* to the regions."

Hence, the system of federal co-operation existing under the Indian Constitution, through allocation by the Union of the taxes collected, or direct grants or allocation of plan funds do not necessarily militate against the concept of federalism and that is why Granville Austin[31] prefers to call Indian federalism as 'co-operative federalism' which "produces a strong central . . . government, yet it does not necessarily result in weak provincial governments that are largely administrative agencies for central policies."

In fact, the federal system in the Indian Constitution is a compromise between two apparently conflicting consideration:

(i) There is a normal division of powers under which the States enjoy autonomy within their own spheres, with the power to raise revenue;

(ii) The need for national integrity and a strong Union government, which the saner section of the people still consider necessary after 59 years of working of the Constitution.

Indian federalism as judicially interpreted.

The interplay of the foregoing two forces has been acknowledged even by the Supreme Court in interpreting various provisions of the Constitution, *e.g.*, in explaining the significance of Art. 301[32] thus—

> "The evolution of a federal structure or a quasi-federal structure necessarily involved, in the context of the conditions then prevailing, a distribution of powers and a basic part of our Constitution relates to that distribution with the three legislative lists in the Seventh Schedule. The Constitution itself says by Art. 1 that India is a Union of States and in interpreting the Constitution one must keep in the view *the essential structure* of a federal or quasi-federal Constitution, namely, that *the units of the Union have also certain powers as has the Union itself* . .
>
> In evolving an integrated policy on this subject our Constitution-makers seem to have kept in mind three main considerations. . . first, in the larger interest of India there must be free flow of trade, commerce and intercourse, both inter-State and intra-State; second, *the regional interests must not be ignored altogether,* and third, there must be a power of intervention by the Union in case of crisis to deal with particular problems that may arise in any part of India . . . Therefore, in interpreting the relevant articles in Part XIII we must have regard to the *general scheme* of the Constitution of India with special reference to Part III, Part XII . . . and their inter-relation to Part XIII *in the context of a federal or quasi-federal Constitution* in which the States have certain powers including the power to raise revenues for their purposes by taxation."

At the same time, there is no denying the fact that the States have occasionally smarted[33] against 'Central dominion' over the States in their exclusive sphere, even in normal times, through the Planning Commission (which itself was not recognised by the Constitution like the Finance Commission, the Public Service Commission or the like). But this is not because the Constitution is not federal in structure[34] or that its provisions envisage unitary control; the defect is *political*, namely, that it is the same Party which dominates both the Union and State Governments and that, naturally, complaints of discrimination or interference with State autonomy are more common in those States which happen to be, for the time being, under the rule of a Party different from that of the Union Government. The remedy, however, lies through the ballot box. It is through political forces, again, that the Union Government may be prevented from so exercising its constitutional powers as to assume an 'unhealthy paternalism'[35]; but that is beyond the ken of the present work. The remedy for a too frequent use of the power to impose President's rule in a State, under Art. 356, is also political.[36]

Survival of Federation in India.

The strong Central bias has, however, been a boon to keep India together when we find the separatist forces of communalism, linguism and scramble for power, playing havoc notwithstanding all the devices of Central control, even after five decades of the working of the Constitution. It also shows that the States are not really functioning as agents of the Union Government[7] or under the directions of the latter, for then, events like those in Assam (over the language problem), or territorial dispute between Karnataka and Maharashtra could not have taken place at all.

That the federal system has not withered away owing to the increasing impact of Central bias would be evidenced by a number of circumstances which cannot be overlooked [see, further, Chap. 33, *post*]:

(a) The most conclusive evidence of the survival of the federal system in India is the co-existence of the Governments of the parties in the States different from that of the Centre. Of course, the reference of the Kerala Education Bill by the President for the advisory opinion of the Supreme Court instead of giving his assent to the Bill in the usual course, has been criticised in Kerala as an undue interference with the constitutional rights of the State, but thanks to the wisdom and impartiality of the Supreme Court, the opinion delivered by the Court[35] was prompted by a purely legalistic outlook free from any political consideration so that the federal system may reasonably be expected to remain unimpaired notwithstanding changes in the party situation so long as the Supreme Court discharges its duties as a guardian of the Constitution.

(b) That federalism is not dead in India is also evidenced by the fact that new regions are constantly demanding Statehood and that already the Union had to yield to such demand in the cases of Meghalaya, Nagaland, Manipur, Tripura, Mizoram, Arunachal Pradesh, Goa, Chhattisgarh,[37] Uttaranchal[38] and Jharkhand.[39]

(c) Another evidence is the strong agitation for greater financial power for the States. The case for greater autonomy for the States in *all* respects was first launched by Tamil Nadu, as a lone crusader, but in October, 1983, it was joined by the States ruled by non-Congress Parties, forming an 'Opposition Conclave', though all the Parties were not prepared to go to the same extent. The enlargement of State powers at the cost of the Union, in the *political* sphere is not, however, shared by other States, on the ground that a weaker Union will be a danger to external security and even internal cohesion, in present-day circumstances. But there is consensus amongst the States, in general, that they should have larger financial powers than those conferred by the existing Constitution, if they are to efficiently discharge their development programmes within the State sphere under List II of the 7th Schedule. The Morarji Desai Government (1977) sought to pacify the States by conceding substantial grants by way of 'Plan assistance', by what has been called the 'Desai award'.[40]

Sarkaria Commission.

It is doubtful, however, whether the agitation for larger constitutional powers in respect of finance will be set at rest by such *ad hoc* palliatives. It is interesting to note that the suggestion, in a previous edition of this book, that the remedy perhaps lay in setting up a Commission for the revision of the Constitution, so that the question of finance may be taken up along with the responsibilities of the Union and the States, on a more comprehensive perspective, has borne fruit in the appointment, in March, 1983, of a one-man Commission, headed by an ex-Supreme Court Judge, SARKARIA, J., empowered to recommend changes[41] in the Centre-State relations' in view of the various developments which have taken place since the commencement of the Constitution. The Commission submitted its Report in 1988. The Supreme Court referred to the report in *S.R. Bommai*[7] (see also under 'Inter-State Council', *post*).

The proper assessment of the federal scheme introduced by *our* Constitution is that it introduces a system which is to *normally* work as a federal system but there are provisions for converting it into a unitary or quasi-federal system under specified exceptional circumstances.[42] But the exceptions cannot be held to have overshadowed the basic and normal structure.[43] The exceptions are, no doubt, unique and numerous; but in cases where the exceptions are not attracted, federal provisions are to be applied without being influenced by the existence of the exceptions. Thus, it will not be possible either for the Union or a State to assume powers which are assigned by the Constitution to the other Government, unless such assumption is sanctioned by some provisions of the Constitution itself. Nor would such usurpation or encroachment be valid by consent of the other party, for the Constitution itself provides the cases in which this is permissible by consent [*e.g.*, *Arts.* 252, 258(1), 258A]; hence, apart from these exceptional cases, the Constitution would not permit any of the units of the federation to subvert the federal structure set up by the Constitution, even by consent. Nor would this be possible by delegation of powers by one Legislature in favour of another.

Conclusion.

In fine, it may be reiterated that the Constitution of India is *neither purely federal nor purely unitary but is a combination of both. It is a Union or composite State of a novel type.*[44] It enshrines the principle that "in spite of federalism, the national interest ought to be paramount".[45]

REFERENCES

1. Draft Constitution, 21-2-1948, p. iv. [The word 'Union', in fact, had been used both in the Cripps proposals and the Cabinet Mission Plan (see under Chap. 2, *ante*), and in the Objectives Resolution of Pandit Nehru in 1947 (Chap. 3, *ante*), according to which residuary powers were to be reserved to the units].
2. C.A.D. Vol. VII, p. 43.
3. See Author's *Select Constitutions of the World*, 1984 Ed., p. 188.

4. Author's *Commentary on the Constitution of India,* 7th (Silver Jubilee) Ed., Vol. A, pp. 33 *et seq.*
5. Prof. W.T. WAGNER, *Federal States and their Judiciary* (Moulton and Co., 1969), p. 25.
6. LIVINGSTONE, *Federation and Constitutional Change,* 1956, pp. 6-7.
7. This view of the Author has been affirmed by the 9-Judge Bench Supreme Court decision in *S.R. Bommai* v. *Union of India, AIR* 1994 S.C. 1918 (para 211).
8. *Ganga Ram Moolchandani* v. *State of Rajasthan,* AIR 2001 SC 2616.
9. Cf. *Gujarat University* v. *Sri Krishna, AIR* 1963 S.C. 703 (*715-16*); *Waverly Mills* v. *Rayman & Co., AIR* 1963 S.C. 90 (*95*).
10. Cf. *State of West Bengal* v. *Union of India, AIR* 1963 S.C. 1241.
11. Cf. *Atiabari Tea Co.* v. *State of Assam,* (1961) 1 S.C.R. 809 (*860*); *Automobile Transport* v. *State of Rajasthan*, AIR 1962 S.C. 1406 (*1416*); Ref. under *Art. 143, AIR* 1965 S.C. 745 (para 39).
12. *S.R. Bommai* v. *Union of India, AIR* 1994 S.C. 1918; **affirming** by and large, the views of the author at pp. 35-55 of C7, Vol. A.
13. *Prof. Yashpal* v. *State of Chhattisgarh,* AIR 2005 SC 2026.
14. *Raja Ram Pal* v. *Hon'ble Speaker, Lok Sabha,* (2007) 3 SCC 184.
15. Though the federal system as envisaged by the Government of India Act, 1935, could not fully come into being owing to the failure of the Indian States to join it, the provisions relating to the Central Government and the Provinces were given effect to as stated earlier [see under 'Federation and Provincial Autonomy', *ante*].
16. *Vide* Table III, col. (A).
17. *Texas* v. *White,* (1869) 7 Wall. 700.
18. A contrary instance is to be found in the Constitution of the *U.S.S.R.* which expressly provides that "each Union Republic shall *retain* the right freely to secede from the U.S.S.R." [Art. 72 of the Constitution of 1977; see Author's *Select Constitutions of the World,* 1984 Ed., p. 188].
19. Author's *Constitutional Law of India* (6th Ed,, 1991, Prentice-Hall of India, p. 46).
20. Each of the 50 States of U.S.A. has two representatives in the Senate.
21. There are three legislative lists in the Seventh Schedule; 99 items in the Union List, 61 items in the State List and 52 items in the Concurrent List [see Table XIX, *post*].
22. K.C. WHEARE, *Federal Government,* 1951, p. 28. He relaxes this view in the 4th Ed. (1963), pp. 26, 77.
23. WHEARE, *Modern Constitutions,* 2nd Ed. (1966), p. 21.
24. C.H. ALEXANDROWICZ, *Constitutional Developments in India,* 1957, pp. 157-70.
25. *Vide* Author's *Commentary on the Constitution of India,* 7th Ed., Vol. A, p. 55.
26. APPLEBY, *Public Administration in India* (1953), p. 51.
27. JENNINGS, *Some Characteristics of the Indian Constitution,* p. 1.
28. E.g. SANTHANAM, *Union-State Relations in India,* 1960, pp. vii; 51, 59, 63. At p. 70, the learned Author observes—

    > "India has practically functioned as a Unitary State though the Union and the States have *tried* to function formally and legally as a Federation."
29. GRIFFITH, *The Impasse of Democracy* 1939, p. 196, quoted in GODSHALL, *Government in the United States,* p. 114.
30. Cf. BIRCH, *Federalism,* pp. 305-06.
31. GRANVILLE AUSTIN, *The Indian Constitution* (1966), pp. 187 *et seq.*
32. *Automobile Transport* v. *State of Rajasthan, AIR* 1962 S.C. 1406 (*1415-16*). In *Keshavananda* v. *Union of India, AIR* 1973 S.C. 1461, some of the judges (paras 302, 599, 1681) considered federalism to be one of the 'basic features' of *our* Constitution. A nine-Judge Supreme Court Bench has in *S.R. Bommai* v. *Union of India, AIR* 1994 S.C. 1918 laid down that the Constitution is federal and some of the Judges characterised federalism as its basic feature.
33. *Vide* Report of the Centre-State Relations Committee (Rajamannar Committee) (Madras, 1971, pp. 7-9).
34. It is interesting to note that even the Rajamannar Committee characterises the system under the Constitution of India as 'federal' (para 5, p. 16, *ibid.*), but suggests amendment of some of its features which have a unitary trend (para 6, p. 16).

35. Re. Kerala Education Bill, AIR 1958 S.C. 956.
36. It is unfortunate that even the Janata Government formed in 1977 which was determined to undo all mischief alleged to have been caused by the long Congress rule, was not convinced of the need to effectively control the frequent use of the drastic power conferred by Art. 356, and that the amendments effected by the 44th Amendment, 1978, in respect of this Article, are not good enough from this standpoint.
37. *Vide* The Madhya Pradesh Reorganisation Act, 2000.
38. *Vide* The Uttar Pradesh Reorganisation Act, 2000.
39. *Vide* The Bihar Reorganisation Act, 2000.
40. *Statesman,* Calcutta, dated 26-2-1979, p. 1.
41. Rao Government, which was in office till 1995, did not implement any of the recommendations made in the report of the Sarkaria Commission.
42. As Dr. Ambedkar explained in the Constituent Assembly (VII C.A.D. 33-34), the political system adopted in the Constitution could be "both unitary as well as federal according to the requirements of time and circumstances".
43. How far the 9-Judge Bench of the Supreme Court in *Bommai's* case (AIR 1994 S.C. 1918) has adopted the Author's views as expressed in the foregoing discussion will be evident from its following observation:

    "The fact that under the scheme of our Constitution, greater power is conferred upon the Centre *vis-a-vis* the States does not mean that states are mere appendages of the Centre. Within the sphere allotted to them, *States are supreme* . . . More particularly, the Courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States. . . let it be said that federalism in the Indian Constitution is not a *matter of administrative convenience, but one of principle*—the outcome of our own historical process and a recognition of the ground realities (para 276).

    This view, expressed by Jeevan Reddy and Agrawal, JJ. is joined by Pandian, J. (para 2). The view is supported by Sawant and Kuldip Singh. JJ. in these words (para 99);

    ". . . the States have an independent constitutional existence. . . they are not satellites nor agents of the Centre. The fact that during emergency and in certain other eventualities their powers are overridden or invaded by the Centre is not *destructive* of the *essential* federal feature of our Constitution. . . they are exceptions and have to be resorted to only to meet the exigencies of the *special situations.* The *exceptions are not a rule* (para 99).
44. GRANVILLE AUSTIN [*The Indian Constitution* (1966), p. 186] agrees with this view when he describes the Indian federation as 'a *new* kind of federalism to meet India's peculiar needs'.
45. JENNINGS, *Some Characteristics of the Indian Constitution,* p. 55.

CHAPTER 6

TERRITORY OF THE UNION

Name of the Union.

AS has been already stated, the political structure prescribed by the Constitution is a federal Union. The name of the Union is India or *Bharat* [*Art.* 1(1)] and the members of this Union at present[1] are the 28 States of Andhra Pradesh, Assam,[2] Bihar, Gujarat, Haryana, Karnataka,[3] Kerala, Madhya Pradesh, Tamil Nadu,[4] Maharashtra, Nagaland, Orissa, Punjab, Rajasthan, Uttar Pradesh, West Bengal, Jammu & Kashmir, Himachal Pradesh, Manipur, Tripura, Meghalaya,[2] Sikkim,[1] Mizoram, Arunachal Pradesh, Goa, Chhattisgarh,[5] Uttaranchal[6] and Jharkhand[7]. Barring Jammu & Kashmir, which has still a special position under the Constitution (see *post,* Chap. 15), the provisions of the Constitution relating to the States now apply to all these States on the same footing.[1]

Territory of India.

The expression 'Union of India' should be distinguished from the expression 'territory of India.' While the 'Union' includes only the States which enjoy the status of being members of the federal system and share a distribution of powers with the Union, the "territory of India" includes the entire territory over which the sovereignty of India, for the time being, extends.

Thus, besides the States, there are two other classes of territories, which are included in the 'territory of India', *viz.*: (i) 'Union Territories', and (ii) Such other territories as may be acquired[8] by India.

(i) The Union Territories are, since 1987, *seven*[9] in number—Delhi, the Andaman & Nicobar Island; *Lakshadweep;*[10] Dadra & Nagar Haveli;[9] Daman & Diu; Pondicherry; and Chandigarh.

For the Union territory of Pondicherry, the Parliament has by enacting a law, *viz.* Pondicherry (Administration) Act, 1962 under Art. 239A made provision for a legislature etc. By an amendment to the Constitution two new articles, *viz.* 239AA and 239AB were inserted in 1992 providing for a legislature and a ministry for Delhi which has been named as National Capital Territory of Delhi by Art. 239AA.[11]

Rest of the Union territories are Centrally administered areas, to be governed by the President, acting through an 'Administrator' appointed by him, and issuing Regulations for their good government [*Arts.* 239-240].

(ii) Any territory which may, at any time, be acquired by India by purchase, treaty, cession or conquest, will obviously form part of the territory of India. These will be administered by the Government of India subject to legislation by Parliament [*Art.* 246(4)].

Thus, the French Settlement of Pondicherry (together with Karaikal, Mahe and Yanam), which was ceded to India by the French Government in 1954, was being administered as an 'acquired territory' until 1962, inasmuch as the Treaty of Cession had not yet been ratified by the French Parliament. After such ratification, the territory of these French Settlements was constituted a 'Union Territory', in December, 1962.

The constitutional developments in Sikkim by way of its integration under the Constitution of India are dramatic.

Sikkim, a new State.

During British days, Sikkim was an Indian State, under a hereditary monarch called Chogyal, subject to British paramountcy. Its external frontier in the Himalayas was demarcated by agreement with China, in 1890. The Chogyal was a member of the Chamber of Princes.

When India became independent, there was a section of public opinion in Sikkim for merger with India. But the Princely Rule of that State and its strategic position stood in the way. Hence, after the lapse of paramountcy, a treaty was entered into between Sikkim and the Government of India, by which the latter undertook the responsibility with regard to the defence, external affairs and communications of Sikkim. Government of India was represented in Sikkim by a Political Officer, who was also assigned to Bhutan. Sikkim thus became a Protectorate of the Union of India.

In May, 1974, the Sikkimese Congress decided to put an end to monarchical rule, and the Sikkim Assembly passed the Government of Sikkim Act, 1974, for the Progressive realisation of a fully responsible government in Sikkim and for furthering its relationship with India. This Act empowered the Government of Sikkim to seek participation and representation of the people of Sikkim in the political institutions of India, for the speedy development of Sikkim in social, economic and political fields.

The Chogyal was made to give his assent to the Government of Sikkim Bill, under which effective power went into the hands of a representative Sikkim Assembly and the Chogyal was turned into a normal constitutional head. The Sikkim Assembly, by virtue of its powers under the Government of Sikkim Act, passed a resolution, expressing its desire to be associated with the political and economic institutions of India and for seeking representation for the people of Sikkim in India's Parliamentary system.

35th Amendment.

The Constitution (35th Amendment) Act, 1974, was promptly passed to give effect to this resolution. The main provisions of this Amendment Act were—

(i) Sikkim will not be a part of the territory of India, but an 'associate State', which was brought within the framework of the Indian Constitution by inserting Art. 2A and 10th Schedule in the Constitution which were subsequently omitted by the Constitution (36th Amendment) Act, 1975.

(ii) Sikkim would be entitled to send two representatives to the two Houses, whose rights and privileges would be the same as those of other members of Parliament, except that the representatives of Sikkim would not be entitled to vote at the election of the President or Vice-President of India. They would also be subject to the disqualifications for members of Parliament under the Indian Constitution.

(iii) The defence, communications, external affairs and social welfare of Sikkim would be a responsibility of the Government of India and the people of Sikkim would have the right of admission to institutions for higher education, to the All-India Services and the political institutions in India.

(iv) The Government of Sikkim shall retain residual power on all matters not provided for in 10th Schedule to the Constitution of India.

There is little doubt that the 35th Amendment Act, 1974, introduced innovations into the original scheme of the Constitution of India. There was no room for any 'associate State' under the Constitution of 1949. India was a federal union of 'States', Union Territories and 'acquired territories' [*Art.* 1(3)]. Of course, Article 2 empowered the Parliament of India to admit new 'States' into the 'Union'. But the Constitution (35th Amendment) Act did not seek to admit Sikkim as a new State of the Indian Union. It was to be a territory *associated with India,* and would have representatives in the Indian Parliament without being a part of the territory of India.

The criticism of the introduction of the status of an 'associate State' into the Indian federal system has, however, lost all practical significance, because Sikkim has shortly thereafter been admitted[12] into the Indian Union as the 22nd State in the First Schedule of the Constitution of India.

We shall now advert to this later development. While the Indian Parliament was enacting the Constitution (35th Amendment) Act, the Chogyal resented and sought to invoke international intervention. This provoked the progressive sections of the people of Sikkim and led to a resolution being passed by the Sikkim Assembly on April 10, 1975, declaring that the activities of the Chogyal were prejudicial to the democratic aspirations of the people of Sikkim and ran counter to the Agreement of May, 1974, executed by the Chogyal. The Assembly further declared and resolved that.

> "This institution of the Chogyal is hereby abolished and Sikkim shall henceforth be a *constituent unit of India,* enjoying a democratic and fully responsible government."

36th Amendment.

This resolution of the Assembly was submitted to the people of Sikkim for their approval. At the referendum so held, there was an overwhelming majority, and the Chief Minister of Sikkim, on behalf of his Council of Ministers, urged the Government of India to implement the result of the referendum. This led to the passing by the Indian Parliament of the Constitution (36th Amendment) Act, 1975, which was later ratified by the requisite number of States under Art. 368(2), Proviso. By the 36th Amendment Act, Sikkim has been admitted into the Union of India as a State, by amending the First and the Fourth Schedules, Art. 80-81, and omitting Art. 2A and the 10th Schedule, with retrospective effect from 26-4-1975. Art. 371F has, further, been inserted to make some special provisions relating to the administration of Sikkim.

Formation of new States and Alteration of Boundaries, etc.

It has already been pointed out that the Indian federation differs from the traditional federal system insofar as it empowers Parliament to alter the territory or integrity of its units, namely, the States, without their consent or concurrence. Where the federal system is the result of a compact or agreement between independent States, it is obvious that the agreement cannot be altered without the consent of the parties to it. This is why the American federation has been described as "an indestructible Union of indestructible States". It is not possible for the national Government to redraw the map of the United States by forming new States or by altering boundaries of the States as they existed at the time of the compact without the *consent* of the Legislatures of the States concerned. But since federation in India was not the result of any compact between independent States, there was no particular urge to maintain the initial organisation of the States as outlined in the Constitution even though interests of the nation as a whole demanded a change in this respect. The makers of *our* Constitution, therefore, empowered Parliament to reorganise the States by a simple procedure, the essence of which is that the affected State or States may express their views but cannot resist the will of Parliament.

The reason why such liberal power was given to the national government to reorganise the States is that the grouping of the Provinces under the Government of India Acts was based on historical and political reasons rather than the social, cultural or linguistic divisions of the people themselves. The question of reorganising the units according to natural alignments was indeed raised at the time of the making of the Constitution but then there was not enough time to undertake this huge task, considering the magnitude of the problem.

The provisions relating to the above subjects are contained in Art. 3-4 of the Constitution.

Article 3 says:

"Parliament may by law—

(a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State,

(b) increase the area of any State,

(c) diminish the area of any State,

(d) alter the boundaries of any State,

(e) alter the name of any State:

Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired."

Article 4 provides that any such law may make supplemental, incidental and consequential provisions for making itself effective and may amend the First and Fourth Schedules of the Constitution, without going through the special formality of a law for the amendment of the Constitution as prescribed by Article 368. These Articles, thus, demonstrate the flexibility of our constitution. By a simple majority and by the ordinary legislative process Parliament may form new States or alter the boundaries, etc., of existing States and thereby change the political map of India. The only conditions laid down for the making of such a law are—

(a) No Bill for the purpose can be introduced except on the recommendation of the President.

Procedure for Reorganisation of States.

(b) The President shall, before giving his recommendation, refer the Bill to the Legislature of the State which is going to be affected by the changes proposed in the Bill, for expressing its views on the changes *within the period specified by the President.* The President is *not,* however, *bound* by the views of the State Legislature, so ascertained.

Here is, thus, a special feature of the Indian federation, *viz.,* that the territories of the units of the federation may be altered or redistributed if the Union Executive and Legislature so desire.[13]

Since the commencement of the Constitution, the foregoing power has been used by Parliament to enact the following Acts:

1. The Assam (Alteration of Boundaries) Act, 1951, altered the boundaries of Assam by ceding a strip of territory from India to Bhutan.

2. The Andhra State Act, 1953, formed a new State named Andhra, by taking out some territory from the State of Madras as it existed at the commencement of the Constitution.

3. The Himachal Pradesh and Bilaspur (New State) Act, 1954, merged the two Part C States of Himachal Pradesh and Bilaspur to form one State, namely, Himachal Pradesh.

4. The Bihar and West Bengal (Transfer of Territories) Act, 1956, transferred certain territories from Bihar to West Bengal.

5. The States Reorganisation Act, 1956, reorganised the boundaries of the different States of India in order to meet local and linguistic demands. Apart from transferring certain territories as between the existing States, it formed the new State of Kerala and merged the former States of Madhya Bharat, Pepsu, Saurashtra, Travancore Cochin, Ajmer, Bhopal, Coorg, Kutch and Vindhya Pradesh in other adjoining States.

6. The Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959, transferred certain territories from the State of Rajasthan to that of Madhya Pradesh.

7. The Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959, made alterations in the boundaries of the States of Andhra Pradesh and Madras.

8. The Bombay Reorganisation Act, 1960, partitioned the State of Bombay to form the new State of Gujarat and to name the residue of Bombay as Maharashtra. Thus, the State of Bombay was split up into two States—Maharashtra and Gujarat.

9. The Acquired Territories (Merger) Act, 1960, provided for the merger into the State of Assam, Punjab and West Bengal of certain territories acquired by agreements between the Government of India and Pakistan, in 1958 and 1959.

A similar transfer of certain territories from West Bengal and Assam to Pakistan under the aforesaid agreement, was provided for by enacting the Constitution (9th Amendment) Act, 1960, because the Supreme Court opined that no territory can be ceded from India to a *foreign country* without amending the Constitution.[14]

10. The State of Nagaland Act, 1962, formed the new State of Nagaland, with effect form 1-2-1964, comprising the territory of the 'Naga Hills-Tuensang Area which was previously a Tribal Area in the Sixth Schedule of the Constitution, forming part of the State of Assam.

11. The next change was introduced by the Punjab Reorganisation Act, 1966, by which the State of Punjab was split up into the State of Punjab and Haryana and the Union Territory of Chandigarh with effect from 1-11-1966.

12. The Andhra Pradesh and Mysore (Transfer of Territory) Act, 1968.

13. The Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968.

14. The Assam Reorganisation (Meghalaya) Act, 1969, created an autonomous sub-State named Meghalaya, within the State of Assam.

15. Himachal Pradesh was upgraded from the status of a Union Territory to that of a State by the State of Himachal Pradesh Act, 1970.

16. The North Eastern Areas (Reorganisation) Act, 1971, similarly, brought up Manipur, Tripura and Meghalaya into the category of States, and added Mizoram and Arunachal Pradesh to the list of Union territories.

17. The Haryana and Uttar Pradesh (Alteration of Boundaries) Act, 1979.

18. Mizoram which had been made a Union Territory by the Act of 1971, was elevated to the status of a State, by the State of Mizoram Act, 1986.

19. Arunachal Pradesh a Union Territory was made a State by State of Arunachal Pradesh Act, 1986.

20. Goa became a State by virtue of Goa, Daman and Diu Reorganisation Act, 1987, separating it from Daman and Diu with effect from 30-5-1987.

21. A new State of Chhattisgarh was created by carving out its territory from that of the territories of the Madhya Pradesh by enacting the Madhya Pradesh Reorganisation Act, 2000 (w.e.f. 1-11-2000).

22. The State of Uttaranchal came into being on 9-11-2000 by separating its territory out of the territories of the Uttar Pradesh vide the Uttar Pradesh Reorganisation Act, 2000.

23. By enacting the Bihar Reorganisation Act, 2000, the State of Jharkhand was created on 15-11-2000 by carving its territory out of the territories of the Bihar State.

REFERENCES

1. In the original Constitution, there were 27 States placed under three categories,—in Parts A, B and C of the First Schedule, having different status and features (as shown in Table III, Col. A). These States underwent some changes by subsequent legislation until the Constitution (7th Amendment) Act of 1956 abolished the three categories and placed all

the States on the same footing (being 15 in number),—as a result of the reorganisation made by the States Reorganisation Act, 1956, which was incorporated in the Constitution (7th Amendment) Act.

2. The 22nd Amendment Act, 1969, was passed to form an autonomous sub-State within the State of Assam, comprising the tribal areas specified in Part A of the Table to para 20 of the 6th Schedule of the Constitution, to meet the demands of the Hill Tribes for a separate State for themselves, which has since been created and named *Meghalaya.*
3. The name of Mysore has been changed into 'Karnataka' by the Mysore State (Alteration of Name) Act, 1973.
4. The name of Madras has similarly been changed into 'Tamil Nadu' by the Madras State (Alteration of Name) Act, 1968.
5. *Vide* The Madhya Pradesh Reorganisation Act, 2000.
6. *Vide* The Uttar Pradesh Reorganisation Act, 2000.
7. *Vide* The Bihar Reorganisation Act, 2000.
8. 'Acquired' means acquired according to any of the modes recognised by International Law *Masthan Sahib* v. *Chief Commr.,* AIR 1962 S.C. 797 (*803*).
9. The Portuguese enclaves of Dadra and Nagar Haveli, having been integrated with India, after the judgment of the International Court in India's favour, the territory of these two enclaves was constituted a Union Territory, by the Constitution (10th Amendment) Act, 1962. Goa, Daman and Diu was added as a Union Territory, by the Constitution (12th Amendment) Act, 1962, and the French Possession of Pondicherry was added by the Constitution (14th Amendment) Act, 1962. The Union Territories of Mizoram and Arunachal Pradesh were formed out of the north-eastern territories of Assam, by the North-Eastern Areas (Reorganisation) Act, 1971. Chandigarh was added as a Union Territory by the Constitution (12th Amendment) Act, 1962.
10. The name of the Laccadive, Minicoy and Amindivi Islands has been changed to 'Lakshadweep' by an Act of 1973.
11. Delhi has now got a special status by the constitution 69th Amendment, 1991, but has not been promoted to the status of a full-fledged State. See the Author's *Shorter Constitution of India,* 12th Ed., p. 756.
12. *Pondyal* v. *Union of India,* AIR 1993 S.C. 1804 (para. 115). [In this case it has been further held that the power of Parliament under Article 2 to admit a new State is *not unlimited* but is subject to judicial review, and it is open to the Court to examine whether the terms and conditions for such admission as provided by Parliament are consistent with the Constitutional Scheme and the basic features of the Indian Constitution.]
13. *State of W.B.* v. *Union of India,* AIR 1963 S.C. 1241.
14. Re *Berubari Union,* AIR 1960 S.C. 845. [This cession could not be effected because the constitutionality of the transfer was challenged in the Courts. Though the Supreme Court upheld the transfer, some part of this ceded territory has been retained by West Bengal by agreement with the then Mujibur Rahaman Government of Bangla Desh, in 1974.]

CHAPTER 7

CITIZENSHIP

Meaning of Citizenship.

THE population of a State is divided into two classes—citizens and aliens. While citizens enjoy full civil and political rights, aliens do not enjoy all of them. Citizens are members of the political community to which they belong. They are the people who compose the State.

Constitutional Rights and Privileges of Citizens of India.

The question of citizenship became particularly important at the time of the making of our Constitution because the Constitution sought to confer certain rights and privileges upon those who were entitled to Indian citizenship while they were to be denied to 'aliens'. The latter were even placed under certain disabilities.

Thus, citizens of India have the following rights under the Constitution which aliens shall not have:

(i) Some of the Fundamental Rights belong to citizens alone, such as,—Arts. 15, 16, 19.

(ii) Only citizens are eligible for certain offices, such as those of the President [*Art.* 58(1)(a)]; Vice-President [*Art.* 66(3)(a)]; Judge of the Supreme Court [*Art.* 124(3)] or of a High Court [*Art.* 217(2)]; Attorney-General [*Art.* 76(2)]; Governor of a State [*Art.* 157]; Advocate-General [*Art.* 165].

(iii) The right of suffrage for election to the House of the People (of the Union) and the Legislative Assembly of every State [*Art.* 326] and the right to become a member of Parliament [*Art.* 84] and of the Legislature of a State [*Art.* 191(d)] are also confined to citizens.

All the above rights are denied to aliens whether they are 'friendly' or 'enemy aliens'. But '*enemy aliens*' suffer from a special disability; they are not entitled to the benefit of the procedural provisions in Cls. (1)-(2) of Art. 22 relating to arrest and detention. An alien enemy includes not only subjects of a State at war with India but also Indian citizens who voluntarily reside in or trade with such a State.

Constitutional and statutory basis of Citizenship in India.

The Constitution, however, did not intend to lay down a permanent or comprehensive law relating to citizenship in India. It simply described the classes of persons who would be deemed to be the citizens of India *at the date of the commencement* of the Constitution and left the entire law of citizenship to be regulated by some future law made by Parliament. In exercise of this power, Parliament has enacted the Citizenship Act (57 of

1955[1]), making elaborate provisions for the acquisition and termination of citizenship *subsequent to the commencement* of the Constitution the provisions of this Act[1] are to be read with the provisions of Part II of the Constitution, in order to get a complete picture of the law of Indian citizenship.

In view of the fact that the Act of Parliament only deals with the modes of acquisition of citizenship *subsequent* to the commencement of the Constitution, it would be convenient to deal with them separately.

A. Persons who became Citizens on January 26, 1950.

A. Under Arts. 5-8 of the Constitution, the following persons became citizens of India at the commencement of the Constitution—

I. A person born as well as domiciled in the 'territory of India'—irrespective of the nationality of his parents [*Art.* 5(a)].

II. A person domiciled in the 'territory of India', either of whose parents was born in the territory of India,—irrespective of the nationality of his parents or the place of birth of such person [*Art.* 5(b)].

III. A person who or whose father or mother was not born in India, but who (a) had his domicile[2] in the 'territory of India', and (b) had been ordinarily residing within the territory of India for not less than 5 years immediately preceding the commencement of the Constitution. In this case also, the nationality of the person's parents is immaterial. Thus, a subject of a Portuguese Settlement, residing in India for not less than 5 years immediately preceding the commencement of the Constitution, with the intention of permanently residing in India, would become a citizen of India at the commencement of the Constitution [*Art.* 5(c)].

IV. A person who had migrated from Pakistan, provided—

(i) He or either of his parents or grand-parents was born in 'India as defined in the Government of India Act, 1935 (as originally enacted)' and—

(ii) (a) if he had migrated before July 19, 1948—he has ordinarily resided within the "territory of India" since the date of such migration (in his case no registration of the immigrant is necessary for citizenship); or

(b) if he had migrated on or after July 19, 1948, he further makes an application before the commencement of this Constitution for registering himself as a citizen of India to an officer appointed by the Government of India, and is registered by that officer, being satisfied that the applicant has resided in the territory of India for at least 6 months before such application [*Art.* 6].

V. A person who migrated from India to Pakistan after the 1st March, 1947, but had subsequently *returned* to India under a permit issued under the authority of the Government of India for resettlement or permanent return or under the authority of any law provided he gets himself registered in the same manner as under Art. 6(b)(ii) [*Art.* 7].

VI. A person who, or any of whose parents or grand-parents was born in 'India' as defined in the Government of India Act, 1935 (as originally enacted) but who is ordinarily residing in any country outside India (whether *before or after* the commencement of this Constitution), on application in the prescribed form, to the consular or diplomatic representative of India in the country of his residence [*Art.* 8]. (Provision was thus made for Indians living in foreign countries at the date of commencement of the Constitution.)

B. Acquisition of Citizenship after January 26, 1950.

B. The various modes of acquisition of citizenship prescribed by the Citizenship Act, 1955, are as follows:

(a) *Citizenship by birth.* Every person born in India on or after January 26, 1950, shall be a citizen of India by birth.

(b) *Citizenship by descent.* Broadly speaking, a person born outside India on or after January 26, 1950, shall be a citizen of India by descent, if either of his parents is a citizen of India at the time of the person's birth.

(c) *Citizenship by registration.* Several classes of persons (who have not otherwise acquired Indian citizenship) can acquire Indian citizenship by registering themselves to that effect before the prescribed authority, *e.g.*, persons of Indian origin who are ordinarily resident in India and have been so resident for five years immediately before making the application for registration; persons who are married to citizens of India.

(d) *Citizenship by naturalisation.* A foreigner can acquire Indian citizenship, on application for naturalisation to the Government of India.

(e) *Citizenship by incorporation of territory.* If any new territory becomes a part of India, the Government of India shall specify the persons of that territory who shall be the citizens of India.

Loss of Indian citizenship.

The Citizenship Act, 1955, also lays down how the citizenship of India may be *lost,*—whether it was acquired under the Citizenship Act, 1955, or prior to it—under the provisions of the Constitution (*i.e.,* under *Arts.* 5-8). It may happen in any of the three ways—renunciation, termination and deprivation.

(a) Renunciation is a voluntary act by which a person holding the citizenship of India as well as that of another country may abjure one of them.[3]

(b) Termination shall take place by operation of law as soon as a citizen of India voluntarily acquires the citizenship of another country.

(c) Deprivation is a compulsory termination of the citizenship of India, by an order of the Government of India, if it is satisfied as to the happening of certain contingencies, *e.g.*, that Indian citizenship had been acquired by a person by fraud, or that he has shown himself to be disloyal or disaffected towards the Constitution of India.

One citizenship in India.

It should be noted in this context, that *our* Constitution, though federal, provides for one citizenship only, namely, the citizenship of India. In federal States like the *U.S.A.* and *Switzerland,* there is a dual citizenship, namely, federal or national citizenship and citizenship of the State where a person is born or permanently resides, and there are distinct rights and obligations flowing from the two kinds of citizenship. In India, a person born or resident in any

State can acquire only one citizenship, namely, that of India and the civic and political rights which are *conferred by the Constitution* upon the citizens of India can be equally claimed by any citizens of India irrespective of his birth and residence in any part of India.

Permanent residence within a State may, however, confer advantages in certain other matters, which should be noted in this context:

(a) So far as employments under the Union are concerned, there shall be no qualification for residence within any particular territory, but by Article 16(3) of the Constitution, Parliament is empowered to lay down that as regards any particular class or classes of employment *under a State* or a Union Territory residence within that State or Territory shall be a necessary qualification. This exception in the case of State employments has been engrafted for the sake of efficiency, insofar as it depends on familiarity with local conditions.

It is to be noted that it is Parliament which would be the sole authority to legislate in this matter and that State Legislatures shall have no voice. To this extent, invidious discrimination in different States is sought to be avoided. Parliament, in the exercise of this power, enacted the Public Employment (Requirement as to Residence) Act, 1957, for a temporary duration. By this Act, Parliament empowered the Central Government to make rules, having force for a specified period, prescribing a residential requirement only for appointment to non-Gazetted posts in Andhra Pradesh, Himachal Pradesh, Manipur and Tripura. Since the expiry of this Act in 1974, nobody can be denied employment in any State on the ground of his being a non-resident in that State.[4]

(b) As will be seen in the Chapter on Fundamental Rights, Art. 15(1), which prohibits discrimination on grounds only of race, religion, caste, sex or place of birth, does not mention *residence.* It is, therefore, constitutionally permissible for a State to confer special benefits upon its residents in matters other than those in respect of which rights are conferred by the Constitution upon all citizens of India. One of these, for instance, is the matter of levying fees for admission to State educational institutions. The Supreme Court has held that because discrimination on the ground of residence is not prohibited by Article 15, it is permissible for a State to offer a concession to its residents in the matter of fees for admission to its State Medical College.[5]

(c) So far as the State of Jammu and Kashmir is concerned, the Legislature of the State is authorised[6] to confer special rights and privileges upon persons permanently resident in the State as respects—

(i) employment under the State Government;
(ii) acquisition of immovable property in the State;
(iii) settlement in the State; or
(iv) right to scholarships and such other forms of aid as the State Government may provide.

REFERENCES

1. The Act is reproduced at pp. 135 *et seq.* of Author's *Commentary on the Constitution of India,* 7th Ed., Vol. A1.

2. 'Domicile' has been defined to be the country which is taken to be a man's permanent home.
3. When a person establishes that he had acquired the citizenship of India but Government contends that he has subsequently lost that citizenship by reason of having voluntarily acquired the citizenship of a foreign State, e.g., by obtaining a Pakistani passport, that question must be determined by the Central Government under s. 9(2) of the Citizenship Act before any action can be taken against such person as a foreigner. The Central Government is vested with exclusive jurisdiction to determine the foregoing question, namely, whether a person, who was a citizen of India, has lost that citizenship by having voluntarily acquired the citizenship of a foreign State, and this question cannot be determined by the State Government or by any Court, either by suit or in a proceeding under Article 226 or under Article 32 (*Govt. of A.P.* v. *Syed Md.,* AIR 1962 S.C. 1778; *State of M.P.* v. *Peer Md.,* AIR 1963 S.C. 645 (*647*).
4. *Pandurangrao* v. *A.P.P.S.C.,* AIR 1963 S.C. 268 (*272*).

   So far as Andhra Pradesh is concerned, separate provisions have since been made in Article 371D, which has been inserted in the Constitution, by the Constitution (32nd Amendment) Act, 1973. Article 371D empowers the President to provide, by an order, for equal opportunities, in the matter of public employment and education, for "the people belonging to different parts of the State," and to set up an Administrative Tribunal, with final powers, to adjudicate upon matters of employment as may be specified in the order.
5. *Joshi* v. *State of Bombay,* (1955) 1 S.C.R. 1215.
6. By Art. 35A, inserted in the Constitution of India, by the Constitution (Application to Jammu & Kashmir) Order, 1954, made by the President in exercise of his power under Article 370.

CHAPTER 8

FUNDAMENTAL RIGHTS AND FUNDAMENTAL DUTIES

Individual Rights and Fundamental Rights.

THE Constitution of England is *unwritten*. Hence, there is, in England, no code of Fundamental Rights as exists in the Constitution of the United States or in other written Constitutions of the world. This does not mean, however, that in England there is no recognition of those basic rights of the individual without which democracy becomes meaningless. The object, in fact, is secured here in a different way. The foundation of individual rights in England may be said to be negative, in the sense that an individual has the right and freedom to take whatever action he likes, so long as he does not violate any rule of the ordinary law of the land. Individual liberty is secured by judicial decisions determining the rights of individuals in particular cases brought before the Courts.

The position in England.

The Judiciary is the guardian of individual rights in England as elsewhere; but there is a fundamental difference. While in England, the Courts have the fullest power to protect the individual against executive tyranny, the Courts are powerless as against legislative aggression upon individual rights. In short, there are no fundamental rights binding upon the Legislature in England. The English *Parliament* being theoretically 'omnipotent', there is no law which it cannot change. As has been already said, the individual has rights, but they are founded on the ordinary law of the land which can be changed by Parliament like other laws. So, there is no right which may be said to be 'fundamental' in the strict sense of the term. Another vital consequence of the supremacy of Parliament is that the English Court has no power of judicial review over legislation at all. It cannot declare any law as unconstitutional on the ground of contravention of any supposed fundamental or natural right.

Bill of Rights in the U.S.A.

The fundamental difference in approach to the question of individual rights between England and the United States is that while the English were anxious to protect individual rights from the abuses of executive power, the framers of the American Constitution were apprehensive of tyranny not only from the Executive but also from the Legislature,—*i.e.*, a body of men who for the time being form the majority in the Legislature.

So, the American Bill of Rights (contained in the first Ten Amendments of the Constitution of the U.S.A.) is equally binding upon the Legislature as upon the Executive. The result has been the establishment in the United States of a 'judicial supremacy', as opposed to the 'Parliamentary supremacy' in England. The Courts in the United States are competent to declare an Act of Congress as unconstitutional on the ground of contravention of any provision of the Bill of Rights. Further, it is beyond the competence of the Legislature to modify or adjust any of the fundamental rights in view of any emergency or danger to the State. That power has been assumed by the Judiciary in the United States.

History of the demand for Fundamental Rights in India.

In *India,* the Simon Commission and the Joint Parliamentary Committee which were responsible for the Government of India Act, 1935, had rejected the idea of enacting declarations of fundamental rights on the ground that "abstract declarations are useless, unless there exist the will and the means to make them effective". But nationalist opinion, since the time of the Nehru Report,[1] was definitely in favour of a Bill of Rights, because the experience gathered from the British regime was that a subservient Legislature might serve as a handmaid to the Executive in committing inroads upon individual liberty.

Regardless of the British opinion, therefore, the makers of our Constitution adopted Fundamental Rights to safeguard individual liberty and also for ensuring (together with the Directive Principles) social, economic and political justice for every member of the community.[2] That they have succeeded in this venture is the testimony of an ardent observer of the Indian Constitution.[3]

> "In India it appears that the Fundamental Rights have both created a new equality. . . and have helped to preserve individual liberty. . . The number of rights cases brought before High Courts and the Supreme Court attest to the value of the Rights, and the frequent use of prerogative writs testifies to their popular acceptance as well. *The classic arguments against the inclusion of written rights in a Constitution have not been borne out in India.* In fact, the reverse may have been the case".[3]

Courts have the power to declare as void laws contravening Fundamental Rights.

So, the Constitution of India has embodied a number of Fundamental Rights in Part III of the Constitution, which are (subject to exceptions, to be mentioned hereafter) to act as limitations not only upon the powers of the Executive but also upon the powers of the Legislature. Though the model has been taken from the Constitution of the United States, the Indian Constitution does not go so far, and rather effects a compromise between the doctrines of Parliamentary sovereignty and judicial supremacy. On the other hand, the Parliament of India cannot be said to be sovereign in the English sense of legal omnipotence,—for, the very fact that the Parliament is created and limited by a written Constitution enables *our* Parliament to legislate only subject to the limitations and prohibitions imposed by the Constitution, such as, the Fundamental Rights, the distribution of legislative powers, etc. In case any of these limitations are transgressed, the Supreme Court and the High Courts are competent to declare a law as unconstitutional and void. So far as the contravention of Fundamental Rights is concerned, this duty is specially enjoined upon the Courts by the Constitution [*Art.* 13], by way of abundant caution. Clause (2) of Art. 13 says—

> "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

To this extent, *our* Constitution follows the *American* model rather than the English.

But the powers of the Judiciary *vis-a-vis* the Legislature are weaker in India than in the United States in two respects:

Fundamental Rights under Indian Constitution distinguished from American Bill of Rights.

Firstly, while the declarations in the American Bill of Rights are absolute and the power of the State to impose restrictions upon the fundamental rights of the individual in the collective interests had to be evolved by the Judiciary,—in India, this power has been expressly conferred upon the Legislatures by the Constitution itself in the case of the major fundamental rights, of course, leaving a power of judicial review in the hands of the Judiciary to determine the reasonableness of the restrictions imposed by the Legislature.

44th Amendment, 1978. The right to property.

Secondly, by a somewhat hasty step, the Janata Government, headed by Morarji Desai, has taken out an important fundamental right, namely, the right of Property, by omitting Arts. 19(1)(f) and 31, by the 44th Amendment Act, 1978. Of course, the provision in Art. 31(1) has, by the same amendment, been transposed to a new article,—Art. 300A, which is *outside* Part III of the Constitution and has been labelled as 'Chapter IV' of Part XII (which deals with 'Finance, Property, Contracts and Suits'),—but that is not a 'fundamental right'.

While under the Congress rule for 30 years, the ambit of the Fundamental Rights embodied in Part III of the original Constitution had been circumscribed by multiple amendments, bit by bit, the death blow to one of the Fundamental Rights came from the Janata Government.

The net result of the foregoing amendments inflicted upon the right to property are—

(i) The right not to be deprived of one's property save by authority of law is no longer a 'fundamental right'. Hence, if anybody's property is taken away by executive fiat without the authority of law or in contravention of a law, the aggrieved individual shall have no right to move the Supreme Court under Art. 32.

(ii) If a Legislature makes a law depriving a person of his property, he cannot challenge the reasonableness of the restrictions imposed by such law, invoking Art. 19(1)(f), because that provision has *ceased to exist.*[4]

(iii) Since Cl.(2) of Art. 31 has vanished, the individual's right to property is no longer a guarantee against the Legislature in respect of any compensation for loss of such property. Article 31(2) [in the original Constitution] embodied the principle that if the State makes a compulsory acquisition or requisitioning of private property, it must (a) make a law; (b) such law must be for a public purpose; and (c) some compensation must be paid to the expropriated owner.

Of course, by the 25th Amendment of 1971, during the regime of Mrs. Gandhi, the requirement of 'compensation' was replaced by 'an amount', the adequacy of which could no longer be challenged before the Courts. Nevertheless, the Supreme Court held, the aggrieved individual might complain if the 'amount' so offered was *illusory* or amounted to 'confiscation'.[5] But even such an innocuous possibility has been foreclosed by the 44th Amendment.

The short argument advanced in the Statement of Objects and Reasons of the 45th Amendment Bill for deleting the fundamental right to property is that it was only being converted into a *legal* right. What is meant is that while Arts. 19(1)(f) and 31(2) of the *original* Constitution operated as limitations on the Legislature itself, the 45th Amendment Bill installs the Legislature as the guardian of the individual's right to property, without any fetter on its goodwill and wisdom. But if the Legislature could be presumed to be so infallible and innocent, this would be a good argument for omitting *all* the fundamental rights from Part III. As it has been pointed out earlier, the very justification of putting limitations on the Legislature by adopting a guarantee of Fundamental Rights is that history has proved that the group of human beings constituting, for the time being, the majority in a Legislative body, are not always infallible and that is why constitutional safeguards are necessary to permanently protect the individual from legislative tyranny.

Thirdly, by subsequent amendments, the arena of Fundamental Rights has been narrowed down by introducing certain exceptions to the operation of fundamental rights, namely, Articles 31A, 31B, 31C, 31D.[6]

Exceptions to Fundamental Rights.

(a) Of these, Arts. 31A, 31C are exceptions to the fundamental rights enumerated in Articles 14 and 19; this means that any law falling under the ambit of Art. 31A (*e.g.*, a law for agrarian reform), or Art. 31C (a law for the implementation of any of the Directive Principles contained in Part IV of the Constitution), cannot be invalidated by any Court on the ground that it contravenes any of the fundamental rights guaranteed by Art. 14 (equality before law); Art. 19 (freedom of expression, assembly, etc.).

(b) Art. 31B, however, offers almost complete exception to all the fundamental rights enumerated in Part III. If any enactment is included in the 9th Schedule, which is to be read along with Art. 31B, then such enactment shall be immune from constitutional invalidity on the ground of contravention of any of the fundamental rights. But shall be open to challenge on the ground of damage to the basic structure of the Constitution subsequent to 24-4-1973 (*i.e.* the date of decision in *Kesavananda's* case).[7]

Fundamental Duties.

Fourthly, by the *42nd Amendment* Act, 1976, a countervailing factor has been introduced, namely, the Fundamental Duties mentioned in Art. 51A. Though these Duties are not themselves enforceable in the Courts nor their violation, as such, punishable, nevertheless, if a Court, before which a fundamental right is sought to be enforced, has to read all parts of the

Constitution, it may refuse to enforce a fundamental right at the instance of an individual who has patently violated any of the Duties specified in Art. 51A.[8] If so, the emphasis of the original Constitution on fundamental rights has been minimised.

Enumeration of Fundamental Rights in Part III, exhaustive.

Fifthly, the category of 'fundamental rights' under our Constitution is exhaustively enumerated in Part III of the Constitution. The *American* Constitution (9th Amendment) expressly says that *the enumeration of certain rights* in the Bill of Rights "shall not be construed to deny or disparage others *retained* by the people." This rests on the theory of inalienable natural rights which can by no means be lost to the individual in a free society; the guarantee of some of them in the written Constitution cannot, therefore, render obsolete any right which inhered in the individual even before the Constitution, e.g., the right to engage in political activity. But there is no such unenumerated right under *our* Constitution.

As was observed in the early case of *A.K. Gopalan* v. *State of Madras,*[9] the Legislatures under *our* Constitution being sovereign except insofar as their sovereignty has been limited by the Constitution either expressly or by necessary implication, the Courts cannot impose any limitation upon that sovereignty either on the theory of the 'spirit of the Constitution' or of that of 'natural rights', *i.e.,* rights other than those which are enumerated in Part III of the Constitution.[10] Any expansion of the Fundamental Rights under the Indian Constitution must, therefore, rest on judicial interpretation and the Supreme Court has gone ahead in this direction by enlarging the scope of Art. 21.[11]

Rights following from other provisions of the Constitution.

It should not be supposed, however, that there is no other justiciable right provided by *our* Constitution outside Part III. Limitations upon the State are imposed by other provisions of the Constitution and these limitations give rise to corresponding rights to the individual to enforce them in a Court of law if the Executive or the Legislature violates any of them. Thus, Art. 265 says that "no tax shall be levied or collected except by authority of law". This provision confers a right upon an individual not to be subjected to arbitrary taxation by the Executive, and if the Executive seeks to levy a tax without legislative sanction, the aggrieved individual may have his remedy from the Courts.[12] The new provision in Art. 300A belongs to this category.[13] Similarly, Art. 301 says that "subject to the provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free". If the Legislature or the Executive imposes any restriction upon the freedom of trade or intercourse which is not justified by the other provisions of Part XIII of the Constitution, the individual who is affected by such restriction may challenge the action by appropriate legal proceedings.[14]

What, then, is the distinction between the 'fundamental rights' included in Part III of the Constitution and those rights arising out of the limitations contained in the other Parts[15] which are equally justiciable? Though the rights of both these classes are equally justiciable, the constitutional remedy by way of an application direct to the Supreme Court under Art. 32, which

Difference between Fundamental Rights and Rights secured by other provisions of Constitution.

is itself included in Part III, as a 'fundamental right', is available only in the case of *fundamental* rights. If the right follows from some *other* provision of the Constitution, say, Art. 265 or Art. 301, the aggrieved person may have his relief by an ordinary suit or, by an application under Art. 226 to the High Court, but an application under Art. 32 shall not lie, unless the invasion of the non-fundamental right involves the violation of some fundamental right as well.[16]

As the word 'fundamental' suggests, under some Constitutions, fundamental rights are immune from constitutional amendment; in other words, they are conferred a special sanctity as compared with other provisions of the Constitution. But this principle has been rejected by the Indian Constitution, as it stands interpreted by amendments of the Constitution themselves and judicial decisions.

Of course, no part of the Constitution of India can be changed by ordinary legislation unless so authorised by the Constitution itself (e.g., Art. 4); but *all* parts of the Constitution except the basic features can be amended by an Amendment Act passed under Art. 368, including the fundamental rights. This proposition has been established after a history of its own:

Amendability of Fundamental Rights; Basic Features.

A. Until the case of *Golak Nath,*[17] the Supreme Court had been holding that no part of our Constitution was unamendable and that Parliament might, by passing a Constitution Amendment Act, in compliance with the requirements of Art. 368, amend any provision of the Constitution, including the Fundamental Rights and Art. 368 itself.[18]

According to this earlier view,[18] thus, the Courts could act as the guardian of fundamental rights only so long as they were not amended by the Parliament of India by the required majority of votes. In fact, some of the amendments of the Constitution so far made were effected with a view to superseding judicial pronouncements which had invalidated social or economic legislation on the ground of contravention of fundamental rights. Thus, the narrow interpretation of Cl. (2) of Art. 19 by the Supreme Court in the cases of *Ramesh Thappar* v. *State of Madras*[19] and *Brij Bhushan* v. *State of Delhi*[20] was superseded by the Constitution (1st Amendment) Act, 1951, while the interpretation given to Art. 31 in the cases of *State of West Bengal* v. *Gopal,*[21] *Dwarkadas* v. *Sholapur Spinning Co.,*[22] and *State of West Bengal* v. *Bela Banerjee,*[23] was superseded by the Constitution (4th Amendment) Act, 1955.

B. But the Supreme Court cried halt to the process of amending the Fundamental Rights through the amending procedure laid down in Art. 368 of the Constitution, by its much-debated decision in *Golak Nath* v. *State of Punjab.*[17] In this case,[17] overruling its two earlier decisions,[18] the Supreme Court held that Fundamental Rights, embodied in Part III, had been given a 'transcendental position' by the Constitution, so that no authority functioning under the Constitution, including Parliament exercising the amending power under Art. 368, was competent to amend the Fundamental Rights.

C. But by the 24th Amendment Act, 1971, Arts. 13 and 368 were amended to make it clear that Fundamental Rights were amendable under the procedure laid down in Art. 368, thus *overriding* the majority decision of the Supreme Court in *Golak Nath* v. *State of Punjab.*[17]

The majority decision in *Kesavananda Bharati's* case[17] upheld the validity of these amendments and also *overruled Golak Nath's case,*[17] holding that *it is competent for Parliament* to amend Fundamental Rights under Art. 368, which does not make any exception in favour of fundamental rights; nor does Art. 13 comprehend Acts amending the Constitution itself. At the same time *Kesavananda's* case[7] also laid down that there were implied limitations on the power to 'amend' and that power cannot be used to alter the 'basic features' of the Constitution.

A big limitation that stands in the way of Parliament, acting by a special majority, to introduce drastic changes in the Constitution, is the judicially innovated doctrine of '*basic features*' which can be eliminated only if a Bench larger than the '13-Judge Bench in *Kesavananda's* case[17] be prepared to overturn the decision in that case. In the meantime, applying *Kesavananda,*[17] the majority of the Constitution Bench has invalidated Cls. (4) and (5) of Art. 368 as violative of the basic features of the Constitution [*Minerva Mills* v. *Union of India,* AIR 1980 S.C. 1789 (paras 21, 28)].

Classification of Fundamental Rights.

The provisions of Part III of *our* Constitution which enumerate the Fundamental Rights are more elaborate than those of any other existing written constitution relating to fundamental rights, and cover a wide range of topics.

I. The Constitution itself classifies the Fundamental Rights under seven groups as follows:

(a) Right to equality.

(b) Right to particular freedoms.

(c) Right against exploitation.

(d) Right to freedom of religion.

(e) Cultural and educational rights.

(f) Right to property.

(g) Right to constitutional remedies.

Right to property omitted.

Of these the Right to Property has been *eliminated* by the 44th Amendment Act, so that only *six* freedoms now remain, in Art. 19(1) [see under '44th Amendment', *ante*].

The rights falling under each of the six categories are shown in Table V.

II. Another classification which is obvious is from the point of view of persons to whom they are available. Thus—

(a) Some of the fundamental rights are granted only to *citizens*—(i) Protection from discrimination on grounds only of religion, race, caste, sex or place of birth [*Art.* 15]; (ii) Equality of opportunity in matters of public employment [*Art.* 16]; (iii) Freedoms of speech, assembly, association, movement, residence and profession [*Art.* 19]; (iv) Cultural and educational rights of minorities [*Art.* 30].

(b) Some of the fundamental rights, on the other hand, are available to *any person* on the soil of India—citizen or foreigner—(i) Equality before the law and equal protection of the Laws [*Art.* 14]; (ii) Protection in respect of conviction against *ex post facto* laws, double punishment and self-incrimination [*Art.* 20]; (iii) Protection of life and personal liberty against action without authority of law [*Art.* 21]; (iv) Right against exploitation [*Art.* 23]; (v) Freedom of religion [*Art.* 25]; (vi) Freedom as to payment of taxes for the promotion of any particular religion [*Art.* 27]; (vii) Freedom as to attendance at religious instruction or worship in State educational institutions [*Art.* 28].

III. Some of the Fundamental Rights are *negatively* worded, as prohibitions to the State, e.g., Art. 14 says—"The State *shall not* deny to any person equality before the law. . ." Similar are the provisions of Arts. 15(1); 16(2); 18(1); 20, 22(1); 28(1). There are others, which *positively* confer some benefits upon the individual [e.g., the right to religious freedom, under Art. 25, and the cultural and educational rights, under Arts. 29(1), 30(1)].

IV. Still another classification may be made from the standpoint of the extent of limitation imposed by the different fundamental rights upon legislative power.

(i) On the one hand, we have some fundamental rights, such as under Art. 21, which are addressed against the Executive but impose no limitation upon the Legislature at all. Thus, Art. 21 simply says that—

> "No person shall be deprived of his life or personal liberty except according to the procedure established by law."

It was early held by our Supreme Court[9] that a competent Legislature is entitled to lay down any procedure for the deprivation of personal liberty, and that the Courts cannot interfere with such law on the ground that it is unjust, unfair or unreasonable. In this view,[9] the object of Art. 21 is not to impose any limitation upon the legislative power but only to ensure that the Executive does not take away a man's liberty except under the authority of a valid law, and in strict conformity with the procedure laid down by such law.[23] In later cases, however, the Supreme Court has found it difficult to immunise laws made under Art. 21 from attack on the ground of 'unreasonableness' under a relevant clause of Art. 19(1), or Art. 14, and recent Supreme Court decisions show an increasing inclination in that direction.[24]

(ii) To the other extreme are Fundamental Rights which are intended as absolute limitations upon the legislative power so that it is not open to the Legislature to regulate the exercise of such rights, e.g., the rights guaranteed by Arts. 15, 17, 18, 20, 24.

(iii) In between the two classes stand the rights guaranteed by Art. 19 which itself empowers the Legislature to impose reasonable restrictions upon the exercise of these rights, in the public interest. Though the individual rights guaranteed by Art. 19 are, in general, binding upon both the Executive and the Legislature, these 'authorities' are permitted by the Constitution to make valid exceptions to the rights within limits imposed by the Constitution. Such grounds, in brief, are security of the State, public order, public morality and the like.

Fundamental Rights—a guarantee against State action.

All the above rights are available against the *State.* It is now settled that the rights which are guaranteed by Arts. 19[25] and 21[26] are guaranteed against State action as distinguished from violation of such rights by *private individuals.* In case of violation of such rights by individuals, the ordinary legal remedies may be available but not the constitutional remedies.

'State action', in this context, must, however, be understood in a wider sense. For interpreting the words 'State' wherever it occurs in the Part on Fundamental Rights, a definition has been given in Art. 12 which says that, unless the context otherwise requires, 'the State' will include not only the Executive and Legislative organs of the Union and the States, but also local bodies (such as municipal authorities) as well as 'other authorities'.[27] This latter expression refers to any authority or body of persons exercising the power to issue orders, rules, bye-laws or regulations having the force of law, e.g., a Board having the power to issue statutory rules, or exercising governmental powers. Even the act of a private individual may become an act of the State if it is *enforced* or *aided* by any of the authorities just referred to.[28]

It should be noted, however, that there are certain rights included in Part III which are available not only against the State but also against private individuals, e.g., Art. 15(2) [equality in regard to access to and use of places of public resort]; Art. 17 [prohibition of untouchability]; Art. 18(3)-(4) [prohibition of acceptance of foreign title]; Art. 23 [prohibition of traffic in human beings]; Art. 24 [prohibition of employment of children in hazardous employment]. But these provisions in Part III are not *self-executory,* that is to say, these articles are not directly enforceable; they would be indirectly enforceable; only if some law is made to give effect to them, and such law is violated. It follows that the classification of fundamental rights into *executory* and *self-executory* is another possible mode of classification.

We may now proceed to a survey of the various fundamental rights, in particular.

Article 14 of the Constitution provides—

> "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Art. 14: Equality before the Law and Equal Protection of the Laws.

Prima facie, the expression 'equality before the law' and 'equal protection of the laws' may seem to be identical, but, in fact, they mean different things. While equality before the law is a somewhat *negative* concept implying the absence of any special *privilege* by reason of birth, creed or the like, in favour of any individual and the equal subjection of all classes to the ordinary law,—equal protection of the laws is a more *positive* concept, implying the *right* to equality of treatment in equal circumstances.

The concept of equality and equal protection of laws in its proper spectrum encompasses social and economic justice in a political democracy.[29]

Equality before Law.

Equality before the law, as a student of English Constitutional law knows, is the second corollary from *Dicey's*[30] concept of the Rule of Law. Equality before law is corelative to the concept of Rule of Law for all round evaluation of healthy social order.[31] The doctrine of equality before law is a necessary corollary to the concept of the rule of law.[32] It is a declaration of equality of all persons within the territory of India, implying thereby the absence of any privilege in favour of any individual.[33] It means that no man is above the law of the land and that every person, whatever be his rank or status, is subject to the ordinary law and amenable to the jurisdiction of the ordinary tribunals. Against, every citizen from the Prime Minister down to the humblest peasant, is under the same responsibility for every act done by him without lawful justification and in this respect, there is no distinction between officials and private citizens. It follows that the position will be the same in India. But even in England, certain exceptions are recognised to the above rule of equality in the public interests.

The concept of equality before law does not involve the idea of absolute equality amongst all, which may be a physical impossibility. Art. 14 guarantees the similarity of treatment and not identical treatment. Art. 14 does not require that the legislative classification should be scientifically or logically perfect.[34] Classification for the purpose of legislation cannot be done with mathematical precision. The legislature enjoys considerable latitude while exercising its wisdom taking into consideration myriad circumstances, enriched by its experience and strengthened by people's will. So long as the classification can withstand the test of Art. 14, it cannot be questioned why one subject was included and the other left out and why one was given more benefit than the other.[35] The concept of equality permits rational or discriminating discrimination. Conferment of special benefits or protection or rights to a particular group of citizens for rational reasons is envisaged under Art. 14 and is implicit in the concept of equality.[36]

The exceptions allowed by the *Indian* Constitution are—

(1) The President or the Governor of a State shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties.

(2) No criminal proceeding whatsoever shall be instituted or continued against the President or a Governor in any Court during his term of office.

(3) No civil proceeding in which relief is claimed against the President or the Governor of a State shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his

personal capacity, whether before or after he entered upon his office as President or Governor of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor, as the case may be, or left at his office stating the nature of the proceedings, the cause of action therefor, the name, description any place of residence of the party by whom such proceedings are to be instituted and the relief which he claims [*Art.* 361].

The above immunities, however, shall not bar—(i) Impeachment proceedings against the President. (ii) Suits or other appropriate proceedings against the Government of India or the Government of a State.

Besides the above constitutional exceptions, there will, of course, remain the exceptions acknowledged by the commity of nations in every civilized country, e.g., in favour of foreign Sovereigns and ambassadors.

Equal Protection of the Laws.

Equal protection of the laws, on the other hand, would mean "that among equals, the law should be equal and equally administered, that likes should be treated alike. . ." Equal protection requires affirmative action by the State towards unequals by providing facilities and opportunities.[37]

In other words, it means the right to equal treatment in *similar circumstances* both in the privileges conferred and in the liabilities imposed by the laws.[38] Art. 14 proceeds on the premise that equality of treatment is required to be given to persons who are equally circumstanced. Implicit in the concept of equality is the concept that the persons who are in fact unequally circumstanced, cannot be treated on a par.[39] However, unequals cannot be clulbbed.[40] None should be favoured and none should be placed under any disadvantage, in circumstances that do not admit of any reasonable justification for a different treatment. Thus, it does not mean that every person shall be taxed equally, but that persons under the same character should be taxed by the same standard. What Article 14 prohibits is "class legislation" and not "classification for purpose of legislation". The legislature can classify persons for legislative purposes so as to bring them under a well-defined class. A classification would be justified unless it is patently arbitrary. If there is equality and uniformity in each group, the law would not become discriminatory though due to some fortuitous circumstances some included in a class get an advantage over others, but they should not be singled out for special treatment.[41] The classification should not be arbitrary; it should be reasonable and be based on qualities and characteristics that have relation to the object of legislation.[42]

But if there is any *reasonable* basis for classification, the Legislature would be entitled to make a different treatment. The legislature is competent to exercise its discretion and make classification.[43] It is for the legislature to identify the class of the people to be given protection and on what basis such protection was to be given. The Court cannot interfere.[44] State has wide discretion in respect of classification of objects, persons and things for the purposes of taxation.[45] The Legislature can devise classes for the purpose of taxing or not taxing, exempting or not exempting, granting incentives and prescribing rate of tax, benefits or concessions.[46] Thus, it may (i) exempt certain classes of property from taxation at all, such as charities, libraries and the like; (ii) impose different specific taxes upon different trades and professions; (iii) tax real and personal property in different manner and so on.

The guarantee of 'equal protection', thus, is a guarantee of equal treatment of persons in 'equal circumstances', permitting differentiation in different circumstances. In other words—

> The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstance in the same position as the varying needs of different classes of persons often require separate treatment.[47]
>
> The principle does not take away from the State the power of classifying persons for legitimate purposes.[48]
>
> "A Legislature which has to deal with diverse problems arising out of an infinite variety of human relations must, of necessity, have the power of making special laws to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate."[48]

In order to be 'reasonable', a classification must not be arbitrary, but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the *object* of the legislation.[49] The reasonableness of a provision depends upon the circumstances obtaining at a particular time and the urgency of the evil sought to be controlled. The possibility of the power being abused is no ground for declaring a provision violative of Art. 14.[50] In order to pass the test, two conditions must be fulfilled, namely, that (1) the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.[38]

It is not possible to exhaust the circumstances or criteria which may accord a reasonable basis for classification in all cases. It depends on the object of the legislation in view and whatever has a reasonable relation to the *object or purpose* of the legislation is a reasonable basis for classification of the persons or things coming under the purview of the enactment. Thus—

(i) The basis of classification may be *geographical*.[47]

(ii) The classification may be according to difference in time.[47]

(iii) The classification may be based on the difference in the *nature* of the trade, calling or occupation, which is sought to be regulated by the legislation.[51]

Similarly, higher educational qualification is a permissible basis of classification for promotion[52] as it has nexus with higher efficiency on the promotional post.[53]

Thus, it has been held that—

(a) In offences relating to women, *e.g.*, adultery, women in India may be placed in a more favourable position, having regard to their social status and need for protection[54] (see under Art. 15, *ante*).

(b) In a law of prohibition, it would not be unconstitutional to differentiate between civil and military personnel, or between foreign visitors and Indian citizens,—for they are not similarly circumstanced from the standpoint of need for prohibition of consumption of liquor.[55]

(c) Exemption to the candidate who stood first in the Forest Rangers College from selection as Assistant Conservator by the Public Service Commission, it being based on reasonable classification, is not *ultra vires* Art. 14.[56]

The guarantee of equal protection applies against substantive as well as procedural laws.[57] The decision making process should be transparent, fair and open.[58] The procedure for distribution of State largesses must be transparent, just, fair and non-arbitrary. Non-transparency promotes nepotism and arbitrariness.[59] The role model for governance and decision taken thereof should manifest equity, fair play and justice. The cardinal principle of governance in a civilized society based on rule of law not only has to base on transparency but must create an impression that the decision-making was motivated on the consideration of probity. The Govt. has to rise above the nexus of vested interests and nepotism and eschew window-dressing. The act of governance has to withstand the test of judiciousness and impartiality and avoid arbitrary or capricious actions.[60] Hence the discretion vested by a statute is to be exercised fairly and judicially and not arbitrarily[61] but subject to the requirements of law.[62] In the absence of rules, the action of the government is required to be fair and reasonable.[63] From the standpoint of the latter, it means that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence, without discrimination. Of course, if the differences are of a *minor* or *unsubstantial* character, which have not prejudiced the interests of the person or persons affected, there would not be a denial of equal protection.[38] Again, a procedure different from that laid down by the ordinary law can be prescribed for a particular class of persons if the discrimination is based upon a reasonable classification having regard to the object which the legislation has in view and the policy underlying it. Thus, in a law which provides for the externment of undesirable persons who are likely to jeopardize the peace of the locality, it is not an unreasonable discrimination to provide that a suspected person shall have no right to cross-examine the witnesses who depose against him, for the very object of the legislation which is an extraordinary one would be defeated if such a right were given to the suspected person.[64] In the Reference on the Special Courts Bill, 1978,[65] the Supreme Court has held that the setting up of a Special Court for the expeditious trial of offences committed during the Emergency period [from 25-6-1975 to 27-3-1977] by high public officials, in view of the congestion of work in the ordinary Criminal Courts and in view of the need for a speedy termination of such prosecutions in the interests of the functioning of democracy under the Constitution of India, is a reasonable classification. But to include in the Bill any offence committed during any period prior to the Proclamation of Emergency in June, 1975, was unconstitutional inasmuch as such classification has no reasonable nexus with the object of the Bill.

Any procedure which comes in the way of a party in getting a fair trial would be violative of Art. 14.[66]

The guarantee of equal protection includes absence of any *arbitrary* discrimination by the laws themselves or in the matter of their *administration.* Thus, even where a statute itself is not discriminatory, but the public official entrusted with the duty of carrying it into operation applies it against an individual, not for the purpose of the Act but *intentionally for the purpose of injuring him,* the latter may have that executive act annulled by the Court on the ground of contravention of the guarantee of equal protection. Of course, it is for the aggrieved individual to establish beyond doubt that the law was applied against him by the public authority "*with an evil eye and an unequal hand*".[38] Wide discretionary power conferred by a statute on any authority must be exercised reasonably in furtherance of public policy and for the public good and the public cause. The authority must record reasons for the said exercise of power even if the statute does not expressly enjoin upon the authority to do so.[67] The action of "State" must satisfy the principal requirements of Art. 14 *viz.* treating persons similarly situated equally and grant of equal protection to them. Reasonableness and fairness is the heart and soul of Art. 14.[68] In short, Art. 14 hits '*arbitrariness*' of State action in any form.[24, 69]

An act which is discriminatory is liable to be labelled as arbitrary.[70]

The court will not interfere in the policy decisions of the Govt. unless the government-action is arbitrary or invidiously discriminatory.[71] The Government policy is not subject to judicial review unless it is demonstrably arbitrary, capricious, irrational, discriminatory or violative of constitutional or statutory provisions.[72]

Two wrongs do not make a right. A party cannot claim that, since something wrong has been done; direction should be given to do another wrong. It would not be setting a wrong right but would be perpetuating another wrong. In such matters there is no discrimination involved. The concept of equal treatment presupposes the existence of similar legal foothold and does not countenance repetition of a wrong action to bring forth wrongs on a par.[73]

It is the duty of State to allay fears of citizens regarding discrimination and arbitrariness.[74] However, protective discrimination in favour of SCs and STs is a part of constitutional scheme of social and economic justice[75] to integrate them into the national mainstream so as to establish an integrated social order with equal dignity of person.[76]

Relation between Arts. 14-16.

As the Supreme Court has observed,[77] Articles 14-16, taken together, enshrine the principle of equality and absence of discrimination.

While the principle is generally stated in Article 14, which extends to all persons,—citizens or aliens, Articles 15 and 16 deal with particular aspects of that equality. Thus,

(a) Art. 15 is available to *citizens* only and it prohibits discrimination against any citizen in any matter at the disposal of the State on any of the specified grounds, namely, religion, race, caste, sex or place of birth.

(b) Art. 16 is also confined to citizens, but it is restricted to one aspect of public discrimination, namely, employment under the State.

In matters not coming under Arts. 15 and 16, if there is any discrimination, the validity of that can be challenged under the general provision in Art. 14.

As just stated, a particular aspect of the equality guaranteed by Art. 14 is the prohibition against discrimination contained in Art. 15 of the Constitution which runs thus:

Art. 15: Prohibition of Discrimination on grounds of Religion, Race, Caste, Sex or Place of Birth.

> "(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
>
> (2) No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to
>
> (a) access to shops, public restaurants, hotels and places of public entertainment; or
>
> (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.
>
> (3) Nothing in this article shall prevent the State from making any special provision for women and children.
>
> (4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
>
> (5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30."

It will be seen that the scope of this Article is very wide. While the prohibition in Cl. (1) is levelled against State action, the prohibition in Cl. (2) is levelled against individuals as well.

Cl. (1) says that any act of the State, whether political, civil or otherwise, shall not discriminate as between citizens on grounds only of religion, race, caste, sex, place of birth or any of them. The plain meaning of this prohibition is that no person of a particular religion, caste, etc., shall be treated unfavourably by the State when compared with persons of any other religion or caste *merely* on the ground that he belongs to the particular religion or caste, etc. The significance of the word 'only' is that if there is any other ground or consideration for the differential treatment besides those prohibited by this Article, the discrimination will not be unconstitutional.[54] Thus, discrimination in favour of a particular sex will be permissible if the classification is the result of other considerations besides the fact that the person belongs to that sex, e.g., physical or intellectual fitness for some work. For instance, women may be considered to be better fitted for the job of a nurse while they may not be considered eligible for employment in heavy industries like a steel factory. Such discrimination, being based on a ground *other than* sex, would not be considered to be unconstitutional.

But if a person is sought to be discriminated against simply because he belongs to a particular community, race or sex, he can get the State action annulled through a Court. While racial discrimination still persists as a malignant growth upon Western society, it speaks volumes for Indian achievement that a possible victim of racial discrimination, in India, can obtain relief direct from the highest Court of the land, by means of a petition for an appropriate writ, and, yet, no such complaint has so far come before the Courts.

As already stated, in regard to the public places specified in Cl. (2), the protection is available even against discriminatory acts by private individuals. Clause (2) provides that so far as places of public entertainment are concerned, no person shall be subjected to discrimination on the grounds only of religion, race, caste, sex, place of birth or any of them, whether such discrimination is the result of an act of the State or of any other individual. Even wells, tanks, bathing ghats, roads, and places of public resort which are owned by private individuals are subject to this prohibition provided they are maintained wholly or partly out of State funds or they have been dedicated to the use of the general public.

The above prohibitions against discrimination, however, would not preclude the State from—

(a) making special provision for women and children;

(b) making special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

These exceptional classes of people require special protection and hence any legislation which is necessary for the making of special provisions for persons of these classes, would not be held to be unconstitutional. Thus, it has been held that s. 497 of the Indian Penal Code, which says that in an offence of adultery though the man is punishable for adultery, the woman is *not* punishable as an abettor, is not unconstitutional, because such immunity is necessary for the protection of women in view of their existing position in Indian society.[54]

Similarly, though discrimination on the ground of caste only is prohibited by Cl. (1) of the Article, it would be permissible under Cl. (4) for the State to reserve seats for the members of the backward classes or of the Scheduled Castes or Tribes or to grant them fee concessions, in public educational institutions.[78] Art. 15(4) envisages the policy of compensatory or protective discrimination but it should be reasonable and consistent with the ultimate public interest *i.e.*, national interest and the interest of community or society as a whole[79] but the provision cannot be justifiably invoked in granting remission to the convicted persons belonging to the scheduled castes and scheduled tribes as it would not be a measure for their 'advancement'. However, the benefit obtained was permitted to be retained.[80] It was held that an SC/ST candidate selected for admission to a course on the basis of merit as a general candidate, should not be treated as a reserved candidate[81] and reservation for admission to the specialities/ super-specialities in post-graduate and doctoral course in medicine is permissible.[82] Cl. (5) was inserted by the Constitution (Ninety-third Amendment) Act, 2005 with effect from 20.1.2006. It empowers the State to make special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes regarding their admission to educational institutions including private ones whether aided or unaided by the State, excepting the minority institutions.

Art. 16: Equality of opportunity in matters of Public Employment.

As a corollary from the general assurance of absence of discrimination by the State on grounds only of religion, race, caste, sex, or place of birth [*Art.* 15], the Constitution guarantees equality of opportunity in matters of public employment. Article 16 says that—

> "(1) There shall be equality of opportunity for all citizens in matters relating to *employment* or appointment to any *office* under the State.
>
> (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth or any of then, be ineligible for . . . .any office under the State."

The expression "matters relating to employment or appointment" contained in Art. 16(1) includes all matters in relation to employment both prior and subsequent to the employment which are incidental to the employment and form part of the terms and conditions of such employment.[83]

The true import of equality of opportunity is not simply a matter of legal equality. Its existence depends not merely on the absence of disabilities but on the presence of abilities and opportunity of excellence in each cadre/grade[84] as equality of opportunity means equality as between the members of the same class of employees and not between that of separate independent classes.[85] All persons similarly situated should be treated similarly. Only because one person has approached the court that would not mean the persons similarly situated should be treated differently.[86] When regular vacancies in posts are to be filled up, a regular process of recruitment or appointment has to be resorted to as per the constitutional scheme, and cannot be done in a haphazard manner based on patronage or other considerations. Hence, appointment / recruitment of temporary, contractual, casual, daily-wage or *ad hoc* employment *dehors* the constitutional scheme cannot be regularised. Such appointees cannot claim to be made permanent.[87] Like other employers, the government is also entitled to pick and choose from amongst a large number of candidates offering themselves for employment. But this can be done on one condition, that all the applicants must be given an equal opportunity along with others who qualify for the same post. The selection test must not be arbitrary and technical qualifications and standards should be prescribed where necessary.[88]

A person cannot be excluded from a State service merely because he is a Brahim,[89] even though this result is reached by reason of a distribution of posts amongst communities according to a ratio or quota.[89] Government jobs or service cannot be denied to the persons suffering from AIDS.[90] This equality is to be observed by the State not only in the matter of appointments to the public services, but also in the matter of any other public employment, where the relationship of master and servant exists between the State and the employee.[91] It bars discrimination not only in the matter of initial appointment but also of promotion and termination of the service itself[92] as "employment" includes promotion.[93]

This right is a safeguard not only against communal discrimination, but also against local discrimination or even against discrimination against the weaker sex.

The right to be considered for promotion by the Departmental Promotion Committee is a fundamental right guaranteed under Art. 16, provided a person is eligible and is in the zone of consideration;[94] but the "consideration" must be "fair" according to established principles governing service jurisprudence.[95]

The only exceptions to the above rule of equality are—

(a) Residence within the State may be laid down by Parliament as a condition for particular classes of employment of appointment under any State or other local authority [*Art.* 16(3)].

By virtue of this power, Parliament enacted the Public Employment (Requirement as to Residence) Act, 1957, empowering the Government of India to prescribe residence as condition for employment in certain posts and services in the State of Andhra Pradesh and in the Union Territories of Himachal Pradesh, Manipur and Tripura. This Act having expired in 1974, there is no provision to prescribe residence as a condition for public employment, except that for Andhra Pradesh special provisions have been made by inserting a new Art. 371D (*post*) in the Constitution itself.

(b) The State may reserve any post or appointment in favour of any backward class of citizens who, in the opinion of the State, are not adequately represented in the services under that State [*Art.* 16(4)]. This is to provide socio-economic equality to the disadvantaged.[96] The expression "backward class of citizens" contained in Art. 16(4) would take Scheduled Castes and Scheduled Tribes within its purview.[97]

(c) Offices connected with a religious or denominated institution may be reserved for members professing the particular religion or belonging to the particular denomination to which the institution relates [*Art.* 16(5)].

(d) The claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration in the matter of appointment to services and posts under the Union and the States, as far as may be consistent with the maintenance of efficiency of the administration [*Art.* 335] but the *proviso*[98] to Art. 335 providing for giving relaxation in qualifying marks in any examination or lowering the standard of evaluation in favour of the members of the SC & ST hits the consideration of maintenance of efficiency in administration and has done away with the emphasis on it laid down by the Apex Court in some cases.[99] The Supreme Court has held[100] that while Art. 16(4) is apparently without any limitation upon the power of reservation conferred by it, it has to be read together with Art. 335 which enjoins that in taking into consideration the claims of the members of the Scheduled Castes and Scheduled Tribes in the making of appointments in connection with the affairs of the Union or a State, the policy of the State should be consistent with "the maintenance of efficiency of administration."[100] The result is that—

> "There can be no doubt that the Constitution-makers assumed. . .that while making adequate reservation under article 16(4) care would be taken not to provide for unreasonable, excessive or extravagant reservation. . .Therefore, like the special provision improperly made under article 15(4), reservation made under article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a *fraud on the Constitution.*"[101]

However, the Constitution (Eighty-second Amendment) Act, 2000 inserted a proviso to Art. 335 almost closing the door for consideration of maintenance of efficiency of administration in the making of appointments to services and posts in connection with the affairs of the Union or of a State inasmuch as the proviso empowered the State to relax the qualifying marks in any examination or lower the standards of evaluation, for reservation in matters of promotions of the members of the SC/ST to any classes of services or posts in connection with the affairs of the Union or a State.

It is to be noted carefully that the prohibition against discrimination in the matter of public employment is attracted where the discrimination is based *only* on any of the grounds enumerated, namely, religion, race, caste, sex, descent, place of birth or residence. It does not prevent the State, like other employers, to pick and choose from a number of candidates, either for appointment or for promotion, on grounds of efficiency, discipline and the like.[102] It is also to be noted that though reservation in favour of backward classes is permissible under Cl. (4) of Art. 16, no such reservation is possible in favour of women; nor is any other discrimination in favour of women possible, *e.g.*, relaxation of rules of recruitment or standard of qualification or the like.

For the furtherance of *social* equality, the Constitution provides for the abolition of the evil of 'untouchability' (see Art. 17, *post*) and the prohibition of conferring titles by the State.

The *Mandal, Commission* case.

A nine-Judge Bench of the Supreme Court has in *Indra Sawhney's* case[103] (popularly known as the Mandal Commission case) laid down the following important points which summarise the law on the issue of reservations in Government employment. [For further discussion, see Author's *Shorter Constitution,* 14th Ed., 2008 under Art. 16(4)].

1. Article 16(4) is exhaustive of the provisions that can be made in favour of the backward classes in the matter of employment.

2. Backward classes of citizens is not defined in the Constitution. There is an integral connection between caste, occupation, poverty and social backwardness. In the Indian context, lower castes are treated as backwards. A caste may by itself constitute a class.

3. The backward classes can be identified in Hindu society with reference to castes along with other criteria such as traditional occupation, poverty, place of residence, lack of education etc., and in communities where caste is not recognised the rest of the criteria would apply.

4. The backwardness contemplated by Art. 16(4) is mainly social. It need not be both social and educational.

5. "Means-test" signifies imposition of an income limit for the purpose of excluding persons from the backward classes. Those whose income is above that limit are referred to as the 'creamy layer'. Income or the extent of property can be taken as a measure of social advancement and on that basis the 'creamy layer' of a given caste can be excluded.[103]

6. For getting reservations a class must be backward and should not be adequately represented in the services under the State.

7. The reservations contemplated in Art. 16(4) should not exceed 50%.

8. The rule of 50% should be applied to each year. It cannot be related to the total strength of the class, service or cadre etc.

9. Reservation of posts under Art. 16(4) is confined to initial appointment only and cannot extend to providing reservation in the matter of *promotion.* If a reservation in promotion exists it shall continue for 5 years (16 Nov. 1997). By the Constitution (77th Amendment) Act, 1995, this limitation of time has been removed by inserting Cl. (4A) to enable it to continue reservation in promotion for the S.C. and S.T.

10. Identification of backward classes is subject to judicial review.

Sub-division of Other Backward Classes contemplated in the Mandal Commission case is not applicable to Scheduled Castes and Scheduled Tribes. Hence sub-classification or subgrouping of SC & ST is not permitted.[104]

Art. 16(4) is an enabling provision and confers a discretionary power on the State to make reservation, if required, but it confers no constitutional right upon the members of the backward classes to claim reservation.[105]

The vacancies reserved could be 'carried forward' for a maximum period of three years if candidates from backward classes were not available afterwhich they were to lapse. By inserting Cl. (4B) in Art. 16 by the Constitution (81st Amendment) Act, 2000, the State has been empowered to consider such unfilled vacancies as a seperate class to be filled up in any succeeding year or years.

Relative scope of Arts. 14, 15 and 16.

Art. 14 lays down the rule of equality in the widest term, while Art. 15 prohibits discrimination on the grounds specified therein but covering the entire range of State activities. Art. 16 embodies the same rule but is narrower in scope since it is confined to State activities relating to office or employment under the State. Both Arts. 15 and 16 operate subject to exceptions therein.[106]

Article 17 of the Constitution says—

Art. 17 : Abolition of Untouchability.

> " 'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'untouchability' shall be an offence punishable in accordance with law."

The vision of the founding fathers of the Constitution to liberate the society from blind and ritualistic adherence to mere traditional superstitious

G.M. College of Education
Gandhi Memorial College Of Education Bantalab Jammu
Raipur, Bantalab
Jammu

Acc. No 8039
Dated 8.12.08

beliefs *sans* reason or rational basis has found expression in the form of Art. 17.[107]

Parliament is authorised to make a law prescribing the punishment for this offence [*Art.* 35], and, in exercise of this power, Parliament has enacted the Untouchability (Offences) Act, 1955, which has been amended and renamed (in 1976) as the Protection of Civil Rights Act, 1955.

The word 'untouchability' has not, however, been defined either in the Constitution or in the above Act. It has been assumed that the word has a well-known connotation,—primarily referring to any social practice which looks down upon certain depressed classes solely on account of their *birth* and disables them from having any kind of intercourse with people belonging to the so-called higher classes or castes. The Act declares certain acts as offences, when done on the ground of 'untouchability', and prescribes the punishments therefor, e.g.

(a) refusing admission to any person to public institutions, such as hospital, dispensary, educational institution;

(b) preventing any person from worshipping or offering prayers in any place of public worship;

(c) subjecting any person to any disability with regard to access to any shop, public restaurant, hotel or public entertainment or with regard to the use of any reservoir, tap or other source of water, road, cremation ground or any other place where 'services are rendered to the public'.

The sweep of the Act has been enlarged in 1976, by including within the offence of practising untouchability, the following—

(i) *insulting* a member of a Scheduled Caste on the ground of untouchability;

(ii) *preaching* untouchability, directly or indirectly;

(iii) *justifying* untouchability on historical, philosophical or religious grounds or on the ground of tradition of the caste system.

The penal sanction has been enhanced by providing that (a) in the case of subsequent convictions, the punishment may range from one to two years' imprisonment; (b) a person convicted of the offence of 'untouchability' shall be disqualified for *election* to the Union or a State Legislature.

If a member of a Scheduled Caste is subjected to any such disability or discrimination, the Court shall presume, unless the contrary is proved, that such act was committed on the ground of 'untouchability'. In other words, in such cases, there will be a statutory presumption of an offence having been committed under this Act.

The prohibition of untouchability in the Constitution has thus been given a realistic and effective shape by this Act.

Art. 18: Abolition of Titles.

'Title' is something that hangs to one's name, as an appendage. During the British rule, there was a complaint from the nationalists that the power to confer titles was being abused by the Government for imperialistic purposes and for corrupting public life. The Constitution seeks to prevent such abuse by prohibiting the State from conferring any title at all.

It is to be noted that—

(a) The ban operates only against the State. It does not prevent other public institutions, such as Universities, to confer titles or honours by way of honouring their leaders or men of merit.

(b) The State is not debarred from awarding military or academic distinctions, even though they may be used as titles.[108]

(c) The State is not prevented from conferring any distinction or award, say, for social service, *which cannot be used as a title, that is, as an appendage to one's name.* Thus, the award of *Bharat Ratna or Padma Vibhushan* cannot be used by the recipient *as a title* and does not, accordingly, come within the constitutional prohibition.

In 1954, the Government of India introduced decorations (in the form of medals) of four categories, namely, *Bharat Ratna, Padma Vibhushan, Padma Bhushan* and *Padma Shri.* While the Bharat Ratna was to be awarded for "exceptional services towards the advancement of Art, Literature and Science, and in recognition of *public service* of the higher order", the others would be awarded for "distinguished public service in any field, including service rendered by Government servants", in order of the degree of the merit of their service.

Though the foregoing awards were mere *decorations* and not intended to be used as appendage to the names of the persons to whom they are awarded, there was a vehement criticism from some quarters that the introduction of these awards violated Art. 18. The critics pointed out that even though they may not be used as titles, the decorations tend to make distinctions according to rank, contrary to the Preamble which promises 'equality of status'. The critics gained strength on this point from the fact that the decorations are divided into several classes, superior and inferior, and that holders of the *Bharat Ratna* have been assigned a place in the 'Warrant of Precedence' (9th place, *i.e.,* just below the Cabinet Ministers of the Union), which is usually meant for indicating the rank of the different dignitaries and high officials of the State, in the interests of discipline in the administration. The result was the creation of a rank of persons on the basis of Government recognition, in the same way as the conferment of nobility would have done.

Another criticism, which seems to be legitimate, is that there is no sanction, either in the Constitution or in any existing law, against a recipient of any such decoration appending it to his name and, thus, using it as a title. Any such use is obviously inconsistent with the prohibition contained in Art. 18(1) but it is not made an offence either by the Constitution or by any law. The apprehensions of the critics on this point were unfortunately justified by the fact that in describing the author on the Title of an issue of the Hamlyn Lectures, the decoration '*Padma Vibhushan*' was, in fact, appended as a title.

The protest raised by Acharya Kripalani against the award of such decorations, which went unheeded earlier was honoured by the Janata regime (1977),—by putting a stop to the practice of awarding *Bharat Ratna*, etc. by the *Government*. But it was *restored* by Mrs. Gandhi after her come-back.

In this context, it is to be noted that Art. 18(1) itself makes an exception in favour of granting by the State of any *military*[108] or *academic* distinction.

The matter was taken to Court, and the Supreme Court has now held[109] that non-military awards by way of recognition of *merit* of *extraordinary work* (e.g., the Padma awards) are not titles of nobility and hence, do not violate Art. 14 or 18, provided they are not used as titles or prefixes or suffixes to the name of the awardee.

Art. 19: The Six Freedoms.

Apart from the rights flowing from the above prohibition, certain positive rights are conferred by the Constitution in order to promote the ideal of liberty held out by the Preamble. The foremost amongst these are the *six* fundamental rights in the nature of 'freedom' which are guaranteed to the citizens by the Constitution of India [*Art.* 19]. These were popularly known as the 'seven freedoms' under our Constitution. It has already been pointed out that in the original Constitution, there were 7 freedoms in Art. 19(1) but that one of them, namely, 'the right to acquire, hold and dispose of property' has been *omitted* by the Constitution (44th Amendment) Act, 1978, leaving only 6 freedoms in this Article. They are—1. Freedom of speech and expression. 2. Freedom of assembly. 3. Freedom of association. 4. Freedom of movement. 5. Freedom of residence and settlement. 6. Freedom of profession, occupation, trade or business.

Since Art. 19 forms the core of *our* Chapter on Fundamental Rights, it is essential for the reader to be familiar with the text of this Article, as it stands amended:

"19. (1) All citizens shall have the right—

(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; and
(f) . . . . . .[110]
(g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of *the sovereignty and integrity of India*, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of *the sovereignty and integrity of India* or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law

imposing, in the interests of *the sovereignty and integrity of India* or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clause (d)-(e) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, *nothing in the said sub-clause, shall affect the operation* of any existing law insofar as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

Flying of National Flag is a symbol of expression coming within the preview of Art. 19(1)(a).[111] A voter's speech or expression in case of election would include casting of votes, that is to say, a voter speaks out or expresses by casting vote.[112] Right to information is an integral part of freedom of expression, particularly a voter's right to know the antecedents /assets of a candidate contesting election.[113] Right to speech implies the right to silence. It implies freedom, not to listen, and not to be forced to listen.[114]

No citizen has a fundamental right under Art. 19(1)(c) to become a member of a voluntary association or a cooperative society. His right is governed by the provisions of the statute. So, the right to become or to continue being a member of the society is a statutory right.[115]

No citizen can claim to have trade in noxious or dangerous goods. Hence, intoxicating liquor being a noxious material, no citizen can claim any inherent right or privilege to sell intoxicating liquor by retail.[116] Education used to be charity or philanthropy in the good old times. Gradually, it became an occupation.[117] The establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no element of profit generation. All citizens have a right to establish and administer educational institutions under Art. 19(1)(g) and the minorities have a special right under Art. 30.[118]

Limitations upon the Freedoms.

Absolute individual rights cannot be guaranteed by any modern State. The guarantee of each of the above rights is, therefore limited by *our* Constitution itself by conferring upon the 'State' a power to impose by its laws reasonable restrictions as may be necessary in the larger interests of the community. This is what is meant by saying that the Indian Constitution attempts "to strike a balance between individual liberty and social control".[119] Since the goal of our constitutional system is to establish a 'welfare State', the makers of the Constitution did not rest with the enumeration of uncontrolled individual rights, in accordance with the philosophy of *laissez faire,* but sought to ensure that where collective interests were concerned, individual liberty must yield to the common good; but, instead of leaving it to the Courts to determine the grounds and extent of permissible State regulation of individual rights as the American Constitution does, the makers of our Constitution specified the permissible limitations in Cls. (2) to (6) of Art. 19 itself.

The 'State', in this context, includes not only the legislative authorities of the Union and the States but also other local or statutory[120] authorities, *e.g.*, municipalities, local boards, etc., within the territory of India or under the control of the Government of India. So, all of these authorities may impose restrictions upon the above freedoms, provided such restrictions are reasonable and are relatable to any of the grounds of public interest as specified in Cls. (2)-(6) of Art. 19.

Thus—

(i) The Constitution guarantees freedom of speech and expression. But this freedom is subject to reasonable restrictions imposed by the State relating to (a) defamation; (b) contempt of court; (c) decency or morality; (d) security of the State; (e) friendly relations with foreign State; (f) incitement to an offence; (g) public order; (h) maintenance of the sovereignty and integrity of India.[121]

'Decency or morality' is not confined to sexual morality alone. It indicates that the action must be in conformity with the current standards of behaviour or propriety.[122] Hence, seeking votes at an election on the ground of the candidate's religion in a secular state, is against the norms of decency and propriety of the society.[123]

It is evident that freedom of speech and expression cannot confer upon an individual a licence to commit illegal or immoral acts or to incite others to overthrow the established government by force or unlawful means. No one can exercise his right of speech in such a manner as to violate another man's such right.[124]

(ii) Similarly, the freedom of *assembly* is subject to the qualification that the assembly must be peaceable and without arms and subject to such reasonable restrictions as may be imposed by the "State" in the interests of public order. In other words, the right of meeting or assembly shall not be liable to be abused so as to create public disorder or a breach of the peace, or to prejudice the sovereignty or integrity of India.[121]

(iii) Again, all citizens have the right to *form associations* or *unions*, but subject to reasonable restrictions imposed by the State in the interests of public order or morality or the sovereignty or integrity of India. Thus, this freedom will not entitle any group of individuals to enter into a criminal conspiracy or to form any association dangerous to the public peace or to make illegal strikes or to commit a public disorder, or to undermine the sovereignty or integrity of India.[125]

(vi) Similarly, though every citizen shall have the right to *move* freely throughout the territory of India or to *reside* and *settle* in any part of the country,—this right shall be subject to restrictions imposed by the State in the interests of the general public or for the protection of any Scheduled Tribe.

(v) Again, every citizen has the right to practise any profession or to carry on any *occupation, trade or business,* but subject to reasonable restrictions imposed by the State in the interests of the general public and subject to any law laying down qualifications for carrying on any profession or technical occupation, or enabling the State itself to carry on any trade or business to the exclusion of the citizens.

Scope for Judicial Review.

As pointed out earlier, one of the striking features of the provisions relating to Fundamental Rights in *our* Constitution is that the very declaration of the major Fundamental Rights is attended with certain limitations specified by the Constitution itself. In the *United States* the Bill of Rights itself does not contain any such limitations to the rights of the individuals guaranteed thereby, but in the enforcement of those rights the courts had to invent doctrines like that of 'Police Power of the State' to impose limitations on the rights of the individual in the interests of the community at large. But, as explained above, in Art. 19 of *our* Constitution, there is a distinct clause attached to each of the rights declared, containing the limitations or restrictions which may be imposed by the State on the exercise of each of the rights so guaranteed. For example, while the freedom of speech and expression is guaranteed, an individual cannot use this freedom to defame another which constitutes an offence under the law. A law which may be made by the State under any of the specified grounds, such as public order, defamation, contempt of court, cannot be challenged as unconstitutional or inconsistent with the guarantee of freedom of expression except where the restrictions imposed by the law can be held to be "unreasonable" by a court of law.

That is how the competing interests of individual liberty and of public welfare have been sought to be reconciled by the framers of *our* Constitution. As MUKHERJEA, J. explained in the leading case of *A.K. Gopalan* v. *State of Madras*[119]—

> "There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights . . . are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace, general order and morals of the community. The question, therefore, arises in each case of *adjusting the conflicting interests* of the individual and of the society. . . Ordinarily every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social security. Article 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law so that they may not conflict with public welfare or general morality.[119]

It is by way of interpretation of the word 'reasonable' that the court comes into the field, and in each case when an individual complains to the court that his Fundamental Right has been infringed by the operation of a law, or an executive order issued under a law, the court has got to determine whether the restriction imposed by the law is reasonable and if it is held to be unreasonable in the opinion of the court, the court will declare the law (and the order, if any) to be unconstitutional and void.[126]

Tests of Reasonableness of a Restriction.

The expression 'reasonable restriction' seeks to strike a balance between the freedom guaranteed by any of the sub-clauses of Art. 19(1) and the social control permitted by any of the exceptions in Cls. (2) to (6). It is to be seen, therefore, what criteria or tests have been laid down by the Supreme Court for determining whether the restriction is reasonable or not. The Supreme Court has said[127-128] that a restriction is reasonable only when there is a proper balance between the rights of the individual and those of the society.

The test of reasonableness should, therefore, be applied to each individual statute impugned and not abstract or general pattern of reasonableness can be laid down as applicable to all cases. The *nature of the right* alleged to have been infringed, the underlying *purpose of the restrictions* imposed, the *extent* and *urgency of the evil* sought to be remedied thereby, the *disproportion* of the imposition, the *prevailing conditions* at the time, should all enter into the judicial verdict.[129] Thus, the formula of subjective satisfaction of the Government and its officers with an advisory Board to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances (e.g., in providing internment or externment for the security of the State), and within the narrowest limits, and not to curtail a right such as the freedom of association, in the absence of any emergent or extraordinary circumstances.[129] All the attendant circumstances must be taken into consideration and one cannot dissociate the actual *contents* of the restrictions from the *manner of their imposition* or the *mode of putting them into practice.*[130]

The Supreme Court has held that in examining the reasonableness of a statutory provision, whether it violated the fundamental right guaranteed under Art. 19, one has to keep in mind:

(1) The Directive Principles of the State Policy.

(2) The restrictions must not be arbitrary or of an excessive nature, going beyond the requirement of the interest of the general public.

(3) No abstract or general pattern or a mixed principle to judge the reasonableness of the restrictions can be laid down so as to be of universal application and the same will vary from case to case as also with regard to the changing conditions, values of human life, social philosophy of the constitution, prevailing conditions and surrounding circumstances.

(4) A just balance has to be struck between the restrictions imposed and social control envisaged by Art. 19(6).

(5) Prevailing social values as also social needs which are intended to be satisfied by the restrictions.

(6) There must be a direct and proximate nexus or reasonable connection between the restrictions imposed and the object sought to be achieved

by the Act, that being so a strong presumption in favour of the constitutionality of the Act will naturally arise.[131]

It follows, therefore, that the question of reasonableness should be determined from both the *substantive* and *procedural* standpoints. Hence,—

Substantive and Procedural reasonableness.

(a) In order to be reasonable, the restriction imposed must have a reasonable relation to the collective object which the legislation seeks to achieve and must not go in excess of that object, or, in other words, the restriction must not be greater than the mischief to be prevented. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness.[128] Thus,—

> The object of an Act was "to provide measures for the supply of adequate labour for agricultural proposes in *bidi* manufacturing areas". But the order of the Deputy Commissioner made thereunder forbade *all* persons residing in certain villages from engaging in the manufacture of *bidis* during the agricultural season. The Supreme Court invalidated the order on the ground that it imposed an unreasonable restriction upon the freedom of business [*Art.* 19(1)(g)] of those engaged in the manufacture of *bidis* because—
>
> The object of the Act could be achieved by legislation restraining the employment of *agricultural* labour in the manufacture of bidis *during the agricultural season* or by regulating hours of work on the business of making *bidis*. A *total* prohibition of the manufacture imposes an *unreasonable* and *excessive* restriction on the lawful occupation of manufacturing *bidis*.[128]

(b) While the foregoing aspect may be said to be the *substantive* aspect of reasonableness, there is another aspect, *viz.*, the *procedural aspect*,—relating to the manner in which the restrictions have been imposed. That is to say, in order to be reasonable, not only the restriction must not be *excessive*, the procedure or manner of imposition of the restriction must also be *fair and just*. In order to determine whether the restrictions imposed by a law are procedurally reasonable, the court must take into consideration all the attendant circumstances such as the *manner* of its imposition, the mode of putting it into practice. Broadly speaking, a restriction is unreasonable if it is imposed in a manner which violates the principles of natural justice, for example, if it seeks to curtail the right of association or the freedom of business of a citizen without giving him *an opportunity to be heard*.[132] It has also been laid down that in the absence of extraordinary circumstances it would be unreasonable to make the exercise of a fundamental right depend on the subjective satisfaction of the Executive.[130]

Freedom of the Press.

There is no specific provision in our Constitution guaranteeing the freedom of the press because freedom of the press is included[133] in the wider freedom of 'expression' which is guaranteed by Art. 19(1)(a). Freedom of expression means the freedom to express not only one's *own* views but also the views of *others* and, by *any* means, including printing. But since the freedom of expression is not an absolute freedom and is subject to the limitations contained in Cl. (2) of Art. 19, laws may be passed by the State imposing reasonable restrictions on the freedom of the press in the interests of the security of the State, the sovereignty and integrity of India, friendly relations with foreign States, public order, decency or morality, or for the prevention of contempt of court, defamation or incitement to an offence. Absolute, unlimited and unfettered freedom of press at all times and in all the circumstances would lead to disorder and anarchy.[134]

The newspapers serve as a medium of exercise of freedom of speech.[135] Any expression of opinion would not be immune from the liability for exceeding the limits. If a citizen, in the garb of exercising the right of free expression in Art. 19(1) tries to scandalise the Court or undermines the dignity of the Court, then the Court would be entitled to exercise the power under contempt provisions.[136]

The Press, as such, has no special privileges in India. From the fact that the measure of the freedom of the Press is the same as that of an ordinary citizen under Art. 19(1)(a), several propositions emerge[133]—

I. The Press is not immune from—

(a) the ordinary forms of taxation;

(b) the application of the general laws relating to industrial relations;

(c) the regulation of the conditions of service of the employees.

II. But in view of the guarantee of freedom of expression, it would not be legitimate for the State—

(a) to subject the Press to laws which take away or abridge the freedom of expression or which would curtail circulation[137] and thereby narrow the scope of dissemination of information or fetter its freedom to choose its means of exercising the right *or* would undermine its independence by driving it to seek Government aid;[137]

(b) to single out the Press for laying upon it excessive and prohibitive burdens which would restrict the circulation, impose a penalty on its right to choose the instruments for its exercise or to seek an alternative media;[137]

(c) to impose a specific tax upon the Press deliberately calculated to limit the circulation of information.[133]

When the constitutionality of an enactment specially directed against the Press is challenged, the Court has to test it by the standard of substantive and procedural reasonableness, as explained earlier. An enactment of this nature, the Punjab Special Powers (Press) Act, 1956, came up before the Supreme Court in *Virendra* v. *State of Punjab*,[138] and the Court annulled one of its provisions, while upholding another, on the following grounds:

> A law which empowers the Government to prohibit, for a *temporary* period, the entry of literature of a *specified class*, likely to cause communal disharmony would not be held to be unreasonable, if it complies with the procedural requirements of natural justice. But it would be unreasonable if it empowered the State Government to prohibit the bringing into the State of *any* newspaper, on its being satisfied that such action was necessary for the maintenance of communal harmony or public order, inasmuch as it placed the whole matter at the subjective satisfaction of the State Government without even providing for a right of representation to the party affected.

Since the expiry of the Press (Objectionable Matter) Act, 1951, in 1956, there was no all-India Act for the control of the Press in India. But in 1976, Parliament enacted the Prevention of Publication of Objectionable Matter

Act, 1976, with more rigorous provisions, and in a *permanent* form. In April, 1977, the Janata Government *repealed* this Act. Subsequently, however, this position was further buttressed by inserting a new Article in the Constitution itself,—Art. 361A[139]—by the Constitution (44th Amendment) Act, 1978.

Censorship.

Censorship of the press, again, is not specially prohibited by any provision of the Constitution. Like other restrictions, therefore, its constitutionality has to be judged by the test of 'reasonableness' within the meaning of Cl. (2).[138]

Soon after the commencement of the Constitution and prior to the insertion of the word 'reasonable' in Cl. (2), the question of validity of censorship came up before *our* Supreme Court, in the case of *Brij Bhushan* v. *State of Delhi.*[140]

The facts of this case were as follows:

> Section 7(1)(c) of the East Punjab Safety Act, 1949, provided that "the Provincial Government . . . if satisfied that such action is necessary for preventing or combating any activity prejudicial to the *public safety* or the maintenance of *public order may,* by order in writing addressed to a printer, publisher, editor require that any matter relating to a particular subject or class of subjects shall before publication be submitted for *scrutiny*".
>
> Similar provisions of the Madras Maintenance of Public Order Act, 1949, were challenged in the allied case of *Ramesh Thappar* v. *State of Madras.*[140]
>
> The majority of the Supreme Court had no difficulty in holding that the imposition of pre-censorship on a journal was an obvious restriction upon the freedom of speech and expression guaranteed by clause (1)(a) of article 19, that 'public safety' or 'public order' was not covered by the expression 'security of the State', and the impugned law was not, therefore, saved by clause (2) as it then stood.

Shortly after these decisions,[140] Cl. (2) was amended by the Constitution (1st Amendment) Act, 1951, inserting 'public order' in Cl. (2). Hence, the ground relied upon by the majority in the cases of *Ramesh Thappar*[140] and *Brij Bhushan*[140] is no longer available. The word 'reasonable' was also inserted in Cl. (2) by the same amendment. The result of this twofold amendment is that if censorship is imposed in the interests of public order, it cannot at once be held to be unconstitutional as fetter upon the freedom of circulation but its 'reasonableness' has to be determined with reference to the circumstances of its imposition. In this sense, the introduction of the word 'reasonable' has not been an unmixed blessing. For, censorship of the press, in *times of peace,* is something unimaginable either in England or in the United States in modern times. But under *our* Constitution, as the Supreme Court decision in *Virendra* v. *State of Punjab*[138] suggests, even at a time of peace, censorship may be valid if it is subjected to reasonable safeguards, both from the substantive and procedural standpoints, but not otherwise. The provisions before the Court[138] were ss. 2 and 3 of the Punjab Special Powers (Press) Act, 1956, which were similar to that in s. 7(1)(c) of the East Punjab Public Safety Act, 1949 (which had been impugned in *Brij Bhushan's* case),[140] except that in the Act of the 1956 what was authorised was even more drastic than pre-censorship, *viz.,*—a total *prohibition.* The Court held that s. 2, which provided for a right of representation against the order of the authority and limited the power to a specified period and as to publications of a specified class, was valid; but that s. 3, which had no such safeguards, constituted an unreasonable restriction.

It would, therefore, follow that a provision for pre-censorship for a limited period in emergent circumstances and subject to procedural safeguards, e.g., as in s. 144 of the Criminal Procedure Code, is valid.[141] If, however, it is left to the absolute discretion[138] of the executive authority, it must be held to be unreasonable. The Supreme Court has, similarly, upheld the validity of a law sanctioning pre-censorship of motion pictures to protect the interests safeguarded by Art. 19(2), e.g., public order and morality.[142]

It should be noted that when a Proclamation of Emergency is made under Art. 352, Art. 19 itself remains suspended [*Art.* 358], so that pre-censorship may be imposed, without any restraint (see Chap. 25, *post*). Thus, immediately after the Proclamation of Emergency on the ground of internal disturbance[143] in June, 1975, a Censorship Order was issued (June 26, 1975), under Rule 48(1) of the Rules made under the Defence and Internal Security of India Act, 1971. It should be noted that on the defeat of Mrs. GANDHI at the election of 1977 the Proclamation of Internal Emergency[143] was revoked on the 21st, and the Press Censorship Order was revoked on the 22nd of March, 1977.

Article 19 would also be inapplicable in cases where Arts. 31A-31C are attracted. These exceptions to Fundamental Rights, which have been introduced by subsequent amendments, will be discussed at the end of this Chapter.

Art. 20: Protection in respect of conviction for Offences.

Article 20 guarantees protection in certain respects against conviction for offences, by prohibiting—

(a) Retrospective criminal legislation, commonly known as *ex post facto* legislation.

(b) Double jeopardy or punishment for the same offence more than once.

(c) Compulsion to give self-incriminating evidence.

Prohibition against *ex post facto* Legislation.

A. The provision against *ex post facto* legislation is contained in Cl. (1) of Art. 20 of our Constitution which runs as follows—

> "No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

This is a limitation upon the law-making power of the Legislatures in India. A law is said to be prospective when it affects acts done or omission made after the law comes into effect. The majority of laws are prospective in their operation. But sometimes the Legislature may give retrospective effect to a law, that is to say, to bring within the operation of the law, not only future acts and omissions but also acts or omissions committed even prior to the enactment of the law in question. Though ordinarily a Legislature can enact prospective as well as *retrospective* laws, according to the present clause a Legislature shall not be competent to make a *criminal law* retrospective so as to provide that a person may be convicted for an act which was not an offence under the law in force at the time of commission of that act or to subject an accused to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. In other words, when the Legislature declares an act to be an offence or provides a penalty for an offence, it cannot make the law retrospective so as to prejudicially affect the persons who have committed such acts prior to the enactment of that law.[144] Enlarging a penal provision for prosecution would be violative of Art. 20(1).[145]

Immunity from Double Prosecution and Punishment.

B. The prohibition against double jeopardy is contained in Cl. (2) of Art. 20 which runs thus—

> "No person shall be prosecuted and punished for the same offence more than once."

The expression 'double jeopardy' is used in the American law but not in *our* Constitution. Nevertheless, Cl. (2) of Art. 20, in effect, lays down a similar principle. As has been laid down by the Supreme Court in *Venkataraman* v. *Union of India,*[146] Art. 20(2) refers to *judicial* punishment and gives immunity to a person from being prosecuted and punished for the same offence more than once. In other words, if a person has been prosecuted and punished in a previous proceeding of an offence, he cannot be prosecuted and punished for the same offence again in a subsequent proceeding. If any law provides for such double punishment, such law would be void. The Article, however, does not give immunity from proceedings other than proceedings before a court of law or a judicial tribunal. Hence, a Government servant who has been punished for an offence in a court of law may yet be subjected to *departmental proceedings* for the same offence, or conversely.[146] If the accused was neither convicted nor acquitted of the charges against him in the first trial, his retrial would not amount to double jeopardy.[147]Prosecution and punishment under two sections of an Act, the offences under the two sections being distinct from each other, does not amount to double jeopardy.[148]

Accused's Immunity from being compelled to give evidence against himself.

C. The immunity from self-incrimination is conferred by Cl. (3) of Art. 20 which says—

> "No person accused of any offence shall be compelled to be a witness against himself."

The scope of this immunity has, *prima facie,* been widened by *our* Supreme Court by interpreting the word 'witness' to comprise both oral and documentary evidence, so that no person can be compelled to furnish *any kind of evidence* which is reasonably likely to support a prosecution against him. Such evidence must, however, be in the nature of a communication. The prohibition is not attracted where any object or document is searched and seized from the possession of the accused.[149] For the same reason, the Clause does not bar the medical examination of the accused or the obtaining of thumb-impression or specimen signature from him.[150]

Secondly, the immunity does not extend to civil proceedings or other than criminal proceedings.[151] It has also been explained by the Supreme Court[149] that in order to claim the immunity from being compelled to make a self-incriminating statement, it must appear that a *formal accusation* has been made against the person at the time when he is asked to make the incriminating statement. He cannot claim the immunity at some general inquiry or investigation on the ground that his statement may at some later stage lead to an accusation.[152]

Art. 21: Freedom of person.

Freedom of person or personal liberty is sought to be ensured by *our* Constitution by means of a two-fold guarantee, namely,—

(a) By providing that no person can be deprived of his liberty except according to law [*Art.* 21];

(b) By laying down certain specific safeguards against arbitrary arrest or detention [*Art.* 22].

A. Article 21 of *our* Constitution provides that—

Protection of life and personal liberty.

"No person shall be deprived of his life or personal liberty except according to the procedure established by law."

This Article reminds us of one of the famous clauses of the Magna Carta:

> "No man shall be taken or imprisoned, disseized or outlawed, or exiled, or in any way destroyed save . . . by the law of the land."

It means that no member of the Executive shall be entitled to interfere with the liberty of a citizen unless he can support his action by some provision of law. In short, no man can be subjected to any physical coercion that does not admit of legal justification. When, therefore, the State or any of its agents deprives an individual of his personal liberty, such action can be justified only if there is a law to support such action and the procedures prescribed by such law have been "strictly and scrupulously"[153] observed.

Again, as under the English Constitution, personal freedom is secured by the Indian Constitution by the judicial writ of *habeas corpus* (see under '*Habeas Corpus*', *post*) [*Arts.* 32 and 226] by means of which an arrested person may have himself brought before the Court and have the ground of his imprisonment examined, and regain his freedom if the Court finds that there is no legal justification for his imprisonment. The Court will also set the prisoner free where there is a law authorising the deprivation of liberty of a person but there has been no strict compliance with the conditions imposed by the law. The Supreme Court has more than once observed that "those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law".[153]

But in no country can there be any absolute freedom of the individual. The principle underlying the *English* Constitution is that it is the people's representatives, assembled in Parliament, who shall determine how far the rights of the individuals should go and how far they should be curtailed in the collective interests or for the security of the State itself, according to exigencies of the time. This was the theory adopted by the Constitution of India in saying that life and personal liberty are subject to "the procedure established by law". The Supreme Court has, however infused judicial review by holding that 'procedure' inherently meant a fair procedure, so that

Art. 21 has been turned into a safeguard against arbitrary legislation. The history of this change in view is as follows:

The *Gopalan* view.

I. Until the 1978-decision in *Maneka's* case,[24] the view which prevailed in *our* Supreme Court was that there was no guarantee in *our* Constitution against arbitrary *legislation* encroaching upon personal liberty. Hence, if a competent Legislature makes a law providing that a person may be deprived of his liberty in certain circumstances and in a certain manner, the validity of the law could not be challenged in a court of law on the ground that the law is unreasonable, unfair or unjust.[154] Under the 'Due Process' Clause of the *American* Constitution (5th and 14th Amendments), the Court has assumed the power of declaring unconstitutional any law which deprives a person of his liberty otherwise than in accordance with the Court's notions of 'due process', that is, reasonableness and fairness. In *England,* this is not possible inasmuch as Courts have no power to invalidate a law made by Parliament. In the result, personal liberty is, in England, "a liberty confined and controlled by law". It exists only so far as it is not taken away or limited by laws made by the representatives of the people. In *A.K. Gopalan* v. *State of Madras,*[154] the majority of *our* Supreme Court propounded the view that by adopting the expression 'procedure established by law', Art. 21 of our Constitution had embodied the English concept of personal liberty in preference to that of American 'Due Process', even though, according to the minority,[154] the result of such interpretation was to throw "the most important fundamental right to life and personal liberty" "at the mercy of legislative majorities." The result, according to the majority, is due to the difference in the basic approach, namely, that—

> "Although our Constitution has imposed some limitations on the legislative authorities yet subject to and outside such limitations our Constitution has left our Parliament and the State legislatures supreme in their respective fields. In the main ... our Constitution has *preferred the supremacy of the legislature to that of the judiciary.*"[154]

It was also held[154-155] that there is no safeguard for personal liberty under our Constitution besides Art. 21, such as natural law or common law. In the result, when personal liberty is taken away by a competent legislation, the person affected can have no remedy.[155]

***Maneka* v. *Union of India*.**

II. It is a striking feature of the development of constitutional law of India that after a long struggle, which may be said to have started tangibly since 1971, the *minority* view in *Gopalan's* case[154] has come to triumph in the 7-Judge decision in *Maneka's* case,[24] which we have already noted. This case[24] has categorically laid down the following propositions, overturning the majority in *Gopalan* :[154]

(a) Arts. 19 and 21 are not water-tight compartments. On the other hand, the expression of 'personal liberty' in Art. 21 is of the widest amplitude, covering a variety of rights of which some have been included in Art. 19 and given *additional* protection. Hence, there may be some overlapping between Arts. 19 and 21.

(b) In the result, a law coming under Art. 21 must *also* satisfy the requirements of Art. 19. In other words, a law made by the State which seeks to deprive a person of his personal liberty must prescribe a *procedure* for such deprivation which *must not be arbitrary, unfair or unreasonable.*

(c) Once the test of reasonableness is imported to determine the validity of a law depriving a person of his liberty, it follows that such law shall be invalid if it violates the principles of natural justice, e.g., if it provides for the impounding of a passport without giving the person affected an opportunity to be heard or to make a representation against the order proposed.[24]

From *Gopalan*[154] to *Maneka,*[24] thus, the judicial exploration has completed its trek from the North to the South Pole. The decision in *Maneka's* case[24] is being followed by the Supreme Court in subsequent cases.

The Supreme Court has held that the right to life as enshrined in Art. 21 means something more than survival or animal existence and would include the right to live with human dignity. If would include right to minimum subsistence allowance during suspension and all those aspects which go to make a man's life meaningful, complete and worthliving.

Adopting a liberal interpretation the Supreme Court[156] has read several rights in Art. 21 to make 'life' more meaningful and worthliving. They may be enumerated as under :

1. Right not be subjected to bonded labour and to be rehabilitated after release.
2. Right to livelihood.
3. Right to decent environment.
4. Right to appropriate life insurance policy.
5. Right to good health.
6. Right to food, water, education (not professional or special), medical care and shelter.
7. Prisoner's right to have necessities of life.
8. Right to speedy, fair and open trial.
9. Right of women to be treated with decency and dignity.
10. Right of privacy.
11. Right to go abroad.
12. Right against solitary confinement.
13. Right against bar felters and handcuffing.
14. Right to legal aid.
15. Right against delayed execution.
16. Right against custodial violence.
17. Right against public hanging.
18. Right to health and medical aid of workers.

19. Right to doctor's assistance.
20. Right to social justice and economic empowerment.
21. Right to freedom from noise pollution.
22. Right to reputation.
23. Right to family pension (release).
24. Right of decent burial or cremation.
25. Right to information.
26. Right to hearing.
27. Right of appeal from judgment of conviction.

Apart from the foregoing judicial salvage, let us now advert to the safeguards which the Constitution itself has provided in Art. 22 against arbitrary arrest and detention. Hence, in a case coming under Art. 22, the requirements of both Arts. 21 and 22 must be complied with.[119]

Protection against Arbitrary Arrest and Detention.

B. The procedural safeguards against arbitrary arrest and detention, provided for in Cls. (1) and (2) of Art. 22, are—(a) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest.

(b) No such person shall be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(c) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

The above safeguards are not, however, available to—(a) an enemy alien; (b) a person arrested or detained under a law providing for preventive detention.

Art. 22: Preventive Detention.

The Constitution itself authorises the Legislature to make laws providing for—

"*Preventive detention*" for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community, or for reasons connected with Defence, Foreign Affairs or the Security of India [7th Sch. List I, Entry 9; List III, Entry 3].

So, it would be competent to the Legislature to enact that a person should be detained or imprisoned *without trial* for any of the above reasons and against such laws, the individual shall have no right of personal liberty. The Constitution, however, imposes certain safeguards against abuse of the above power [*Art.* 22(4)-(7)]. It is these safeguards which constitute fundamental rights against arbitrary detention and it is because of these safeguards that 'preventive detention' has found a place in the Part of 'Fundamental Rights' in *our* Constitution. The relevant provisions of Art. 22 read as follows:

When a person has been arrested under a law of *preventive detention*—

(i) The Government is entitled to detain such person in custody only for *three months*. If it seeks to detain the arrested person for more than 3 months, it must obtain a report from an Advisory Board,—who will examine the papers submitted by the Government and by the accused,—as to whether the detention is justified.

(ii) The person so detained shall, as soon as may be, be informed of the grounds of his detention excepting facts which the detaining authority considers to be against the public interest to disclose.

(iii) The person detained must have the earliest opportunity of making a representation against the order of detention.[154]

A law which violates any of the conditions imposed by Art. 22, as stated above, is liable to be declared invalid and an order of detention which violates any of these conditions will, similarly, be invalidated by the Court, and the detenu shall forthwith be set free.[157]

Parliament has the power to prescribe, by law, the maximum period for which a person may be detained under a law of preventive detention.

Meaning of Preventive Detention.

Preventive detention means detention of a person without trial. It is so called in order to distinguish it from *punitive* detention. The object of punitive detention is to *punish* a person *for what he has done* and after he is tried in the courts for the illegal act committed by him. The object of preventive detention, on the other hand, is to *prevent him from doing* something and the detention in this case takes place on the apprehension that he is going to do something wrong which comes within any of the grounds specified by the Constitution, *viz.*, acts prejudicial to the security of the State, public order, maintenance of supplies and services essential to the community; defence; foreign affairs or security of India. In fact, preventive detention is resorted to in such circumstances that the evidence in possession of the authority is not sufficient to make a charge or to secure the conviction of the detenu by legal *proofs* but may still be sufficient to justify his detention on the *suspicion* that he would commit a wrongful act unless he is detained.

Preventive detention is something unknown in the United States of America or the United Kingdom, in times of peace. The adoption (in India) on a permanent footing, of the power of the Executive to arrest persons on suspicion, which is tolerated in other countries only in emergencies, cannot, on principle, be justified by any lover of liberty. But no proper assessment of this provision of *our* Constitution is possible without taking note of the following circumstances:

History of Preventive Detention of India.

Firstly, detention without trial was not a new idea introduced by the makers of *our* Constitution, for the first time. It was in existence since the early days of British India, under the notorious Bengal Regulation III of 1818 (the Bengal State Prisoners Regulation) and similar enactments in Madras and Bombay which laid no fetters upon the powers of the Government to detain a person on suspicion. Then came Rule 26 of the

Rules framed under the Defence of India Act, 1939, which authorised the Government to detain a person whenever it was "satisfied with respect to that particular person that such detention was necessary to prevent him from acting in any manner prejudicial" to the defence and safety of the country and the like.[158] This was, of course, a wartime measure modelled on similar legislation in England, during World War II, the validity of which had been upheld by the House of Lords.[159] But even after the cessation of the War, preventive detention was continued in India as an instrument to suppress apprehended breach of public order, public safety and the like by the Provincial Maintenance of Public Order Acts, under which there was a spate of litigation. The framers of *our* Constitution simply made it possible for such legislation to be continued under the Constitution, subject to certain safeguards laid down therein, because they painfully visualised that the circumstances which had necessitated such abnormal legislation in the past had not disappeared at the birth of India's Independence. It is common knowledge that the Republic had its birth amidst anti-social and subversive forces and the ravages of communal madness involving colossal loss of lives and property. In order to save the infant Republic from the inroads of any such subversive elements, therefore, this power had to be conferred upon the State. But the framers of the Constitution improved upon the existing law by subjecting the power of preventive detention to certain constitutional safeguards upon the violation of which the individual could have a right to approach the Supreme Court or the High Courts because the safeguards are fundamental rights, for the enforcement of which the constitutional remedies would lie. There have been a number of cases in which the Courts have nullified orders of preventive detention, in proceedings for *habeas corpus.*

Secondly, the above provisions of the Constitution are not self-executory but require a law to be made by the Legislature, conforming to the conditions laid down in the Article, and preventive detention can subsist only so long as the Legislature permits. The Preventive Detention Act, 1950 was, thus, passed by the Indian Parliament which constituted the law of preventive detention in India. It was a temporary Act, originally passed for one year only. Several times since then the term of the Act was extended until it expired at the end of 1969. The revival of anarchist forces obliged Parliament to enact a new Act, named the Maintenance of Internal Security Act (popularly known as MISA) in 1971, having provisions broadly similar to those of the Preventive Detention Act of 1950. In 1974, Parliament passed the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (commonly referred to as the COFEPOSA), as an economic adjunct of the MISA. While the MISA was, in general, aimed at subversive activities, the COFEPOSA is aimed at anti-social activities like smuggling, racketing in foreign exchange and the like. MISA was repealed in 1978, but COFEPOSA still remains. Further power of preventive detention has been conferred on the Central and State Governments to safeguard defence and security of the country and to maintain public order and essential supplies and services by enacting the National Security Act, 1980,[160] and the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980.[161] With the increase in terrorist activities the government had to pass in 1985 the Terrorist and Disruptive Activities (Prevention) Act, 1985 (commonly called TADA). This has widely been used to curb terrorism. However, TADA was repealed in 1995. For the same purposes, the Prevention of Terrorism Act, 2002 (commonly called POTA) was enacted on March 28, 2002 but that too was repealed on October 23, 2004.

It may be mentioned that the number of detenus, during the Emergency of 1975-76, had soared up to 1,75,000. On the eve of coming to power, the Janata Party promised to abolish detention without trial. After coming to power, the Janata Government came to realise the reality of the problem. Eventually, in April, 1978, the MISA was *repealed* by Parliament. But the Government refused to repeal the COFEPOSA because while the former related to political detention, the latter was aimed at *social* offences which required extra power to check when inflation, blackmarketing, smuggling and the like were rampant.

The provisions in Cls. (2)-(7) of Art. 22 could not be altogether omitted, so long as preventive detention was authorised by COFEPOSA. The Janata Government, therefore, sought to alleviate the rigours of the procedure for preventive detention, by effecting changes in Cls. (4) and (7), by enacting the Constitution (44th Amendment) Act, 1978. But the relevant provision of this Amendment Act could not be brought into effect immediately since some changes in the machinery of the Advisory Boards had to be made. Hence, the Amendment Act of 1978 empowered the Central Government to bring into force these provisions by issuing notifications. Paradoxically, however, before any such notification could be issued, the Janata Government had its fall and Mrs. Gandhi returned to power in January, 1980. The Government has not issued any such notification notwithstanding adverse comments by the Supreme Court in view of the inordinate delay.[160] In the result, the original Clauses relating to preventive detention in Art. 22 subsist till today and the relevant provisions of the Amendment Act of 1978, solemnly passed by Parliament, remain a *dead-letter.*

Legislative power to enact Preventive Detention Act.

Some States, *e.g.*, Jammu and Kashmir and Madhya Pradesh have enacted State laws, authorising preventive detention[162] which recall the *old* Preventive Detention Act of 1950. It should be pointed out in this context that the legislative power to enact law of preventive detention is divided by the Constitution between the Union and the States. The Union has exclusive power [Entry 9 of *List* I, 7th *Sch.*] only when such law is required for reasons connected with Defence, Foreign Affairs or the Security of *India.* A State has power, concurrently with the Union, to provide for preventive detention for reasons connected with security of the *State,* maintenance of public order, or the maintenance of supplies and services essential to the community [Entry 3 of List III]. A State has therefore a say in the matter of abolishing preventive detention on these grounds because it is a responsibility of the State to maintain public order [Entry 1 of List II], production, supply and distribution of goods [Entry 27 of List II].

So long as the concurrent power of the States to legislate for preventive detention with respect to the aforesaid grounds remains and any of them feels the need for retaining or making State laws for preventive detention, it is practically difficult for the Union Government to impose its will on such

States. Till then, the existence of Art. 22 on the Constitution will be beneficial, rather than prejudicial, to the cause of liberty, because the validity of such State laws can be challenged on the ground of contravention of the safeguards laid down in Art. 22.[154]

In these circumstances, Art. 22 continues to be on the Constitution as a necessary evil.

Art. 23: Right against Exploitation.

As an adjunct to the guarantee of personal liberty and the prohibition against discrimination, *our* Constitution lays down certain provisions to prevent exploitation of the weaker sections of the society by unscrupulous individuals or even by the State.

Article 23 says—

Prohibition of Traffic in Human Beings and Forced Labour.

> "(1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
>
> (2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them."

Slavery in its ancient form may not so much be a problem in every State today but its newer forms which are labelled in the Indian Constitution under the general term "exploitation" are no less a serious challenge to human freedom and civilisation. It is in this view that *our* Constitution, instead of using the word 'slavery' uses the more comprehensive expression 'traffic in human beings' which includes a prohibition not only of slavery but also of traffic in women or children or the crippled, for immoral or other purposes.[163] Our Constitution also prohibits forced labour of any form which is similar to *begar,* an indigenous system under which landlords sometimes used to compel their tenants to render free service.[163-164] What is prohibited by the clause is therefore the act of compelling a person to render gratuitous service where he was lawfully entitled either not to work or to receive remuneration for it. The clause therefore does not prohibit forced labour as punishment for a criminal offence. Nor would it prevent the State from imposing compulsory recruitment or conscription for public purposes, such as military or even social service.

Art. 23 has an element of force.[165]

Special provision for the protection of children is made in Art. 24 which says—

Art. 24: Prohibition of Employment of Children in Factories, etc.

> "No child below the age of fourteen years, shall be employed to work in any factory or mine or engaged in any other hazardous employment."

It is to be noted that the prohibition imposed by this Article is absolute and does not admit of any exception for the employment of a child in a factory or mine or in any other 'hazardous employment', *e.g.*, in a railway or a port. The Supreme Court directed that children should not be employed in hazardous jobs in factories and positive steps should be taken for the welfare of such children as well as improving the quality of their life[166] and the employers of children below 14 years must comply with the provisions of the Child Labour (Prohibition and Regulation) Act providing for compensation, employment of their parents/ guardians and their education.[167]

Arts. 25-28: Freedom of Conscience and Free Profession, Practice and Propagation of Religion.

India, under the Constitution, is a "Secular State", *i.e.,* a State which observes an attitude of *neutrality and impartiality towards all religions.* A secular State is founded on the idea that the State is concerned with the relation between man and man and not with the relation between man and God which is a matter for individual conscience. The attitude of impartiality towards all religions is secured by the Constitution by several provisions [*Arts.* 25-28]:

Firstly, there shall be no "State religion" in India. The State will neither establish a religion of its own nor confer any special patronage upon any particular religion. It follows from this that—

(a) the State will not compel any citizen to pay any taxes for the promotion or maintenance of any particular religion or religious institution [*Art.* 27];

(b) no religious instruction shall be provided in any educational institution *wholly provided* by State funds;

(c) even though religious instruction be imparted in educational institutions *recognised* by or *receiving aid* from the State, no person attending such institution shall be compelled to receive that religious instruction without the consent of himself or of his guardian (in case the pupil be a minor). In short, while religious instruction is totally banned in State-owned educational institutions, in other denominational institutions it is not totally prohibited but it must not be imposed upon people of other religions without their consent [*Art.* 28].

Secondly, every person is guaranteed the freedom of conscience and the freedom to profess, practise and porpagate his own religion, subject only—

(a) to restrictions imposed by the State in the interests of public order, morality and health (so that the freedom of religion may not be abused to commit crimes or anti-social acts, e.g., to commit the practice of infanticide, and the like);

(b) to regulations or restrictions made by the State relating to any economic, financial, political or other *secular* activity which may be *associated* with religious practice, but do not really appertain to the freedom of conscience;

(c) to measures for social reform and for throwing open of Hindu religious institutions of a *public* character to all classes and sections of Hindus.

Subject to the above limitations, a person in India shall have the right not only to entertain any religious belief but also to practise the observances dictated by such belief, and to preach his views to others [*Art.* 25].

Thirdly, not only is there the freedom of the individual to profess, practise and propagate his religion, there is also the right guaranteed to every religious group or denomination—

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law [*Art.* 26].

To those who have any idea as to what part religion plays in the entire being of the common man in India, the bold pronouncements in the above Articles must appear to be astoundingly progressive, and more so, if we consider that while the other half of the truncated territory, consisting of a large mass of Hindu minority, has adopted Islam as the State religion in her Constitution, India stands firm, regardless of her environments. It is to be noted that this guarantee is available not only to the citizens of India but to all persons, including aliens.[168]

The ambit of the freedom of religion guaranteed by Arts. 25-26 has been widened by the judicial interpretation that what is guaranteed by Arts. 25 and 26 is the right of the *individual* to practise and propagate not only matters of faith or belief but also all those rituals and observances which are regarded as integral parts of a religion by the followers of its doctrines.[168] Of course, religion is a matter of faith but it is not necessarily theistic and there are well-known religions in India like Buddhism and Jainism which do not believe in God. On the other hand, though a religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, it would not be correct to say that religion is nothing else but a doctrine of belief.[168] Similarly, each religious denomination or organisation enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are *essential* according to the tenets of the religion they hold.[169] Regulation by the State, again, cannot interfere with things which are essentially religious.[170] But the Court has the right to determine whether a particular rite or observance is regarded as essential by the tenets of a particular religion,[171] and to interfere if a particular practice offends against public health or morality,[170] or, not being an essentially religious practice, contravenes any law of social, economic or political regulation.[170]

It should be pointed out in this context that the word 'secular' is a dubious word, capable of diverse meanings and one of its dictionary meanings is 'concerned with the affairs of the *world*' as opposed to religious affairs. This has not only caused confusion amongst teachers of Political Science and Law in India but has also been taken advantage of by interested parties. This state of confusion has been set at rest by authoritative pronouncements made by the Supreme Court in a nine-Judge decision, as follows:[172]

(a) Secularism, in India, does not mean that the State should be hostile to religion but that it should be *neutral* as between the different religions.[172]

(b) Every individual has the freedom to profess and practise his own religion, and it cannot be contended that "if a person is a devout Hindu or a devout Muslim, he ceases to be secular".[172]

(c) The use of the vague word 'secular' in the Preamble would *not* override the enacted provisions in Arts. 25-30 or Art. 351, so that the preference of Sanskrit in the academic syllabus as an *elective*[173-174] subject, while not conceding this status to Arabic or Persian or the like, would *not* militate against the basic tenets of secularism (para 20).[173]

(d) The neutrality of the state would be violated if religion is used for *political* purposes and advocated by the political parties for their political ends. An appeal to the electorate on grounds of religion offends secular democracy (para 128).[172] Politics and religion cannot be mixed (para 131).[172] If a State Government does this, it will be a fit case for application of Art. 356 of the Constitution against it [*Para* 365(10)].[172]

(e) It is in this sense that secularism is to be regarded as a *basic feature* of the Constitution [*Paras* 124, 231, 365(10)].[172]

'Propagation' and Conversion.

It is amazing that some Christian leaders assert that the word propagate' in Art. 25(1) gives them a fundamental right to convert people of other Faiths into Christianity, *by any means*. This assertion, followed by agitation, is particularly amazing because it seeks to undermine the decision of the Supreme Court in *Stainislaus's* case[175] in January, 1977, which had been brought by a Christian Father, who sought to invalidate a Madhya Pradesh Act, because it made it a penal offence to convert or to attempt to convert a person by means of 'force, fraud or allurement'. Orissa had earlier passed a similar Act (which used the word 'inducement' in place of allurement') and the constitutionality of that Act had been challenged by several members of the Christian community, including a Christian Society, a Professor of Geology and several priests. Both the Acts were taken up together by the Supreme Court[175] and the contentions of the Christian community were rejected *in toto*, by the Supreme Court, laying down the following propositions of law which are, under the Constitution, binding upon all Courts in India:

(i) The right to 'propagate', in Art. 25(1), gives to each member of every religion the right to spread or disseminate the tenets of his religion (say, by advocacy or preaching), but it would *not* include the *right to convert* another, because each man has the same freedom of 'conscience' guaranteed by that very provision [*Art.* 25(1)], on which the Christians relied.

(ii) The equal freedom of conscience, belonging to each man, under Art. 25(1), means that he has the freedom to choose and hold any faith of his choice and *not to be converted* into another religion by means of force, fraud, inducement or allurement. He can, of course, voluntarily adopt another religion, but 'force, fraud, inducement or allurement' takes away the free consent from the would-be convert.

(iii) Even assuming that a particular religion had the right to propagate its tenets by any means, including conversion,—the State has the right and duty to intervene if such activity of conversion offended against 'public order, morality or health', because the guarantee of freedom of religion in Art. 25(1) is subject to the limitations of 'public order, morality, or health' as follows:

> "25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

(iv) If any such right to convert be conceded, such right would belong to *every* religion, so that there would inevitably be a breach of the public peace if *every* religious community carried on a campaign to convert people belonging to other faiths, by the use of force, fraud, inducement or allurement. The State was, therefore, constitutionally authorised, nay, enjoined—to maintain public order by prohibiting and penalising conversion (including attempt to convert) if force, fraud, inducement or allurement was used by the person or persons advocating conversion in any particular case. This is exactly what had been done by the M.P. and Orissa Acts.

The Supreme Court, therefore, upheld[175] the constitutional validity of both the M.P. and Orissa Acts, after rejecting every plea raised on behalf of the Christian parties. After this pronouncement of the Supreme Court, the Arunachal Pradesh Legislature passed a Bill, modelled exactly on the M.P. and Orissa Acts, which had been held to be valid by the Supreme Court and submitted it to the President for his assent; a private member of Parliament (Shri O.P. TYAGI) presented before the *Lok Sabha* a similar Bill, which, if passed by Parliament, would be applicable to all the States of India. The Christian community at once started agitations and demonstrations against these two Bills, with threats against severer resistance if these measures were passed. They politicised the issue, with the slogan that it was a campaign against the Christian religion in particular.[176] This contention involves *suppressio veri* (suppression of truth) on the following points:

(i) Neither of the disputed Bills was levelled against the Christian religion as such but would have operated against *any* religious community (including the Hindu, Muslim, Sikh, etc.) which resorted to any of these unlawful means—force, fraud, inducement or allurement, in order to convert a member of another Faith to its own fold.

(ii) That *all* the legal points now raised against these two pending Bills were taken by the Christian parties to the Madhya Pradesh and Orissa Acts case but were definitely rejected by the Supreme Court.

International covenant.

(iii) Those who rely on the International Charters in support of their freedom to convert have not mentioned Art. 18(2) of the International Covenant on Civil and Political Rights, 1966, which says—

> "No one shall be subject to *coercion* which would impair his freedom to have or to adopt a religion or belief of his choice."

This freedom of every man to adopt a religion of his choice is guaranteed by Cl. (1) of Art. 18. The two clauses, read together, mean that every individual shall have the freedom to choose his own religion or belief in worship and this freedom shall not be impaired by the use of *coercion* by any individual attempting to induce him to adopt another religion. So far as the disputed Indian Bills ban the use of *force* as a means of conversion, it is perfectly in line with this International Charter. When *fraud* is used, the freedom of choice of the individual sought to be converted is similarly impaired. The only dispute which may possibly be raised by the Indian Christians is as to the use of *inducement or allurement.* But such means, too, impair the freedom of choice of an individual and his resultant choice or volition cannot be said to be *free,* within the meaning of Art. 18(1) of the International Covenant, referred to. The validity of use of these two words in an Indian Bill would rest not on the wording of the International Covenant which is the resultant of various international factors, but on the interpretation of the words 'public order and morality' in Art. 25(1) of our Constitution, which constitutes the supreme law of this land.

(iv) If the agitators were dissatisfied with the Supreme Court's interpretation of Art. 25(1), they were free to challenge the constitutionality of the provisions of the disputed Bills after they were passed[176] and to persuade the Judges of the Supreme Court to revise their views as expressed in the *Stainislaus* case;[136] but there was not the least justification to denounce the Bills as a crusade against the Christians in particular, when they were nothing but a codification of the principles laid down by the highest tribunal of the land and on the model of the State statutes which had been approved by that tribunal in the *Stainislaus* case.[175]

Apart from the foregoing guarantee of freedom of conscience and religion, there are certain general provisions which are aimed at ensuring the effectiveness of the above guarantee by prohibiting any discrimination by the State on the ground of religion alone:

(i) The State shall not discriminate against a citizen, in any matter [*Art.* 15(1)], and, in particular, in the matter of employment [*Art.* 16(2)], only upon the ground of religion.

(ii) Similar discrimination is banned as regards access to or use of public places [*Art.* 15(2)]; admission into any educational institution maintained or aided by the State [*Art.* 29(2)], the right to vote [*Art.* 325].

(iii) Where a religious community is in the minority, the Constitution goes further to enable it to preserve its culture and religious interests by providing that—

Art. 29. (a) The State shall not impose upon it any culture other than the community's own culture [*Art.*29(1)];

Art. 30 (b) Such community shall have the right to establish and administer educational institutions of its choice and the State shall not, in granting aid to educational institutions, discriminate against such an educational institution maintained by a minority community on the ground that it is under the management of a religious community [*Art.* 30]. Full compensation has to be paid if the State seeks to acquire the property of a minority educational institution [*Art.* 30(1A)].

The expression "minority" has been used in two senses—one based on religion and the other on the basis of language. Since reorganisation of the States in India has been on linguistic lines, therefore, for the purpose of determining the minority, the unit will be the State and not the whole of India. Hence, minorities have to be considered Statewise. It is a relative term and is referred to, to represent the linguistic or religious sections or groups forming less than 50% of the total population of the State.[177]

The sum-total of the above provisions make *our* State more secular than even the United States of America. The *secular* nature of our Constitution has been further highlighted by inserting this word in the Preamble, by the Constitution (42nd Amendment) Act, 1976.[178] A word of caution should, however, be uttered in this context. What is meant by 'secularism' or the safeguards of the minority, are exhaustively enumerated in Arts. 25-30 and allied provisions (as to minority rights, see, further, under Chap. 29, *post*). If a minority community presses for any *extra* favours outside these specific provisions in the name of 'secularism' or the Party in power yields them for political reasons, it might be re-introducing those vices of communalism from which India suffered so much during the later British regime and which the fathers of the Constitution eliminated from the Constitution of free India, *e.g.*, communal representation in the Legislatures[179] or communal reservation in public employment. For instance, if Government seeks to justify an appointment to a public office, high or low, not on the ground of merit, but on the ground that the appointee belongs to a religious minority, such discrimination would violate the fundamental right of any other community under Art. 16(2), not to be "discriminated against" on the ground of 'religion' or the like. Instead of safeguarding the rights of a minority community, it would deny the rights of the *majority* and other minority communities which are guaranteed by the Constitution itself. Neither secularism nor minority rights can, therefore, be allowed to be an argument for *preference* of the minority or to undermine the national unity and strength, for which the confidence of the majority is no less necessary. But a minority educational institution has the power to reserve only upto 50% seats for students belonging to its own community.[180]

An institution retains its minority character as long as it continues to achieve two objectives, *viz.* (i) to enable such minority to conserve its religion and language, and (ii) to give a thorough, good, general education to children belonging to such minority.[181]

The right to establish and administer would include the right to have choice of medium of instruction.[182] The Supreme Court[183] has summarised general principles relating to establishment and administration of educational institutions by minorities thus :

(*i*) The right of minorities to establish and administer educational institutions of their choice comprises the following rights :

(*a*) to choose its governing body in whom the founders of the institution have faith and confidence to conduct and manage the affairs of the institution;

(*b*) to appoint teaching staff (teachers/lecturers and Headmasters/ Principals) as also non-teaching staff, and to take action if there is dereliction of duty on the part of any of its employees;

(*c*) to admit eligible students of their choice and to set up a reasonable fee structure;

(*d*) to use its properties and assets for the benefit of the institution.

(*ii*) The right conferred on minorities under Article 30 is only to ensure equality with the majority and not intended to place the minorities in a more advantageous position *vis-a-vis* the majority. There is no reverse discrimination in favour of minorities. The general laws of the land relating to national interest, national security, social welfare, public order, morality, health, sanitation, taxation, *etc.* applicable to all, will equally apply to minority institutions also.

(*iii*) The right to establish and administer educational institutions is not absolute. Nor does it include the right to maladminister. There can be regulatory measures for ensuring educational character and standards and maintaining academic excellence. There can be checks on administration as are necessary to ensure that the administration is efficient and sound, so as to serve the academic needs of the institution. Regulations made by the State concerning generally the welfare of students and teachers, regulations laying down eligibility criteria and qualifications for appointment, as also conditions of service of employees (both teaching and non-teaching), regulations to prevent exploitation or oppression of employees, and regulations prescribing syllabus and curriculum of study fall under this category. Such regulations do not in any manner interfere with the right under Article 30(1).

(*iv*) Subject to the eligibility conditions/qualifications prescribed by the State being met, the unaided minority educational institutions will have the freedom to appoint teachers/lecturers by adopting any rational procedure of selection.

However, the right of the minorities is not absolute and is subject to regulations.[184] Reasonable regulations can be imposed for protecting the larger interest of the State and the nation. While imposing the regulations, the State shall be cautious not to destroy the minority character of the institution.[185]

The Preamble to *our* Constitution aims at securing the 'unity and integrity of the nation'. Religious and cultural safeguards have been guaranteed by the Constitution to minority communities in order to ensure them 'justice, freedom of thought, expression, belief, faith and worship'. But if any minority community goes on clamouring for *more* than what the framers of the Constitution offered to them, it would simply *perpetuate* the insular objectives of those communities and India would never grow up into a

Nation, inspired with the ideal of 'unity and integrity of the Nation'. To revert to the ante-independence vortex of communalism and separatism would imperil the very foundation of Independence. On the other hand, secularism which means *neutrality* of the State towards *all* religions will itself be violated if the Government suppresses the religious or other legal rights of the majority community to appease the demands of an aggressive minority.

A history of the right to property under the Constitution of India.

The Constitution of 1949 had a three-fold provision for safeguarding the right of private property. It not only guaranteed the right of *private ownership* but also the right to *enjoy* and *dispose* of property free from restrictions other than reasonable restrictions.

I. *The Constitution of 1949.*

Firstly, it guaranteed to every citizen the right to acquire any property by any lawful means such as inheritance, personal earning or otherwise, to hold it as his own and to dispose it freely, limited only by (a) reasonable restrictions to serve the exigencies of public welfare, and (b) any other reasonable restrictions that may be imposed by the State to protect the interests of any Scheduled Tribe [*Art.* 19(1)(f)].

The restrictions must, of course, be 'reasonable', from the substantive as well as the procedural standpoints. Thus—

(a) The restriction must not be in excess of the requirement of the interest of the general public for which the restriction is sought to be imposed.[186]

(b) A restriction would be procedurally unreasonable if, in the absence of extraordinary circumstances, it is imposed without notice or without hearing or without assigning any reason, on the subjective satisfaction of an administrative authority.[187]

Secondly, the Constitution guaranteed that no person shall be deprived of his property save by the authority of law [*Art.* 31(1)]. This implied that, short of the consent of the owner, a man's property can be taken only by the consent of the nation as embodied in the laws passed according to the Constitution. Any property which is seized by the Police or the Government[188] without proper legal authority will be released at the intervention of the Courts. As against its own subjects, a sovereign cannot exercise an 'Act of State', and the private property of a subject cannot be taken away by an *executive* order,[189] as distinguished from an order made in exercise of power conferred by a statute.[189]

This clause was intended to be a protection against executive, but not against legislative, appropriation of property. The Supreme Court, however, held that the law which seeks to deprive a person of his property must be a valid law, which means a law enacted by a competent Legislature and not inconsistent with any of the fundamental rights guaranteed by Part III of the Constitution.[190]

Thirdly, the Constitution enjoined that if the State wants to *acquire* the private property of an individual or to *requisition* (that is, to take over its possession for a temporary period) it, it could do so only on two conditions—

(a) that the acquisition or requisitioning is for a *public purpose;*

(b) that when such a law is passed, it must provide for payment of an *amount* to the owner,—either by fixing the amount or by specifying the *principle* upon which it is to be determined and given [*Art.* 31(2)].

II. *Amendments up to the 42nd Act, 1976.*

The provisions of the Constitution as to the obligation to pay compensation for acquisition of property for public purposes, however, underwent serious changes as a result of amendments of the Constitution by the First, the Fourth, the Seventeenth, the Twenty-fifth and the Forty-second Amendment Acts.[191] The net result of these amendments is as follows—

A. Though the Legislature was under a constitutional obligation to pay compensation, the *adequacy* of the compensation shall not be liable to be questioned in a court of law. In other words, when a law provided for the acquisition of person's property for a public purpose, he would not be entitled to challenge the validity of that law in a court of law on the ground that the Legislature had not provided for payment of the full value of his property. This (Fourth) amendment (1955) in Art. 31(2) was necessitated by the fact that even the word 'compensation' *simpliciter* was interpreted by the Supreme Court[192] as implying 'full compensation', that is, the market value of the property at the date of the acquisition. The Government thought that it was not practicable to implement its programme of national planning and development if the full market value was to be paid from the inadequate resources of the infant Republic for every inch of the property which was to be nationalised. But even after the foregoing amendment, the Supreme Court continued to hold that the very word 'compensation' implied full monetary equivalent of the property taken away from the owner, that is, its market value at the date of the acquisition.[193]

The 25th Amendment.

By the 25th Amendment of 1971, therefore, the word 'compensation' in Cl. (2) of Art. 31 was substituted by the word '*amount*'. But, again, the majority of the Supreme Court reserved an area *for* judicial intervention, in the Full Bench case of *Keshavananda* v. *State of Kerala,*[194] by holding that the amount which was fixed by the Legislature could not be arbitrary or *illusory,* but must be determined by a principle which is relevant to the acquisition of property. [The Indira Government reacted by putting specified laws of acquisition beyond the pale of Art. 31 altogether, by engrafting the exceptions in Arts. 31A-31D,[191] which will be mentioned presently.]

B. By a number of successive amendments, certain exceptions to Art. 31(2) were introduced, in Arts. 31A-31D,[191] to exclude the obligation to pay any amount as compensation in the case of laws providing for acquisition by the State or nationalisation, if such laws relate to matters specified in these exceptional provisions. These exceptions to the obligations under Art. 31 may now be examined in particular:

(a) Art. 31A relates to a law for the acquisition by the State of any 'estate' or other intermediate interest in *land*. The object of taking out the acquisition of intermediate interests in land from the obligation to pay compensation was to make it possible for the Government to effect agrarian reform which was so urgently needed to protect the interests of the tenants as well as to improve the agricultural wealth of the country.

In order to facilitate agrarian reform as well as social control of the means of production, it has been provided in Art. 31A that not only a law providing for the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, but also certain other laws, such as a law providing for the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, shall be constitutionally valid even though it takes away or abridges any of the rights conferred by Arts. 14 and 19.

(b) While Art. 31A excepts certain *classes* of laws, Art. 31B, read with the 9th Schedule, gives a blanket cover to *particular enactments* which are, for the time being specified in the 9th Schedule. Their number, in 2000 is 284. They have been altogether immunised from attack, on the ground of contravention of any of the Fundamental Rights.

(c) Art. 31C, as inserted by the 25th Amendment Act, 1971, provided that any law which seeks to implement the Directive in Art. 39(b) or 39(c), *i.e.*, the plan of socialistic distribution of wealth, and the means of production shall not be void for inconsistency with Arts. 14 or 19.

But the effectiveness of Art. 31C was crippled by the decision of the majority of the Supreme Court in the case of *Keshavananda*[194] that judicial review is one of the essential features of the Indian Constitution which cannot be taken away by the process of amendment under Art. 368, and that, accordingly, that part of Art. 31C, which stated that any legislative declaration that a particular law was made to implement the Directives in Art. 39(b)-(c) shall not be open to question in a Court, is itself unconstitutional.

III. *The 42nd Amendment, 1976.*

Undaunted by *Keshavananda,*[194] Parliament enlarged the scope of Art. 31C, by the *42nd Amendment* Act, 1976, by including within its protection any law to implement *any* of the Directive Principles enumerated in Part IV of the Constitution—not merely in Art. 39(b)-(c). As a result of this, if any law of acquisition was made with the object of giving effect to *any of the Directives,* the reasonableness of such a law cannot be questioned under Art. 14 or 19. *Minerva Mills*[195] has, however, nullified this extension.

(d) The last faggot of exceptions Article 31D, has been repealed by the 43rd (Constitution Amendment) Act, 1977, and need not bother the reader.[191]

IV. *The 44th Amendment, 1978.*

While the Congress Government for over a quarter of a century had eaten into the vitals of Art. 31(2) by successive amendments, as outlined above, it was left to the Janata Government to *eliminate* the right of property altogether from the list of Fundamental Rights in Part III. This has been effected by the 44th Amendment Act, 1978, which we have already discussed in connection with Judicial Review. Nevertheless, its incidents may be recapitulated in order to give a definite idea as to how much of the right to property remains under the Indian Constitution after April, 1979, and in what shape.

(a) Art. 19(1)(f) has been repealed.

(b) Art. 31(1) has been taken out of Part III, and made a separate Article, *viz.,* 300A, which reads as follows:

> "No person shall be deprived of his property save by authority of law."

The result, in short, is that if an individual's property is taken away by a public official without legal authority or in excess of the power conferred by law in this behalf, he can no longer have speedy remedy direct from the Supreme Court under Art. 32 (because the right under Art. 300A is *not* a fundamental right). He shall have to find his remedy from the High Court under Art. 226 or by an ordinary suit.

(c) Cls. (2A)—(6) of Art. 31 have been omitted.

(d) Cl. (2) of Art. 31 has been omitted,[196] but its Proviso has been *transferred* to Art. 30, as Cl. (1A) to that Article.

(e) Though Art. 31 itself has been deleted, Art. 31A which was originally inserted as an exception to Art. 31 has been retained, with the omission of any reference to Art. 31. Article 31A, therefore, remains to operate as an exception to Arts. 14 and 19, to shield the 5 classes of laws specified in Art. 31A(1). Curiously, however, the 2nd Proviso to Art. 31A(1) has been retained, giving a right to full compensation to the actual tiller, even though Art. 31 has been omitted and a reference to Art. 31 has been omitted from Cl. (1) to Art. 31A, to which the 2nd Proviso operates as an exception.

The above patchwork is bound to create confusion in the mind of a lay reader. It would, accordingly, be profitable to outline the vestiges of the right to compensation which survive the onslaught of the 44th Amendment. These are twofold:

Vestiges of the right to property, and comments thereon.

Though the mass of citizens shall no longer have any guaranteed right to compensation if his property is acquired or requisitioned and the Legislature shall have no constitutional obligation to provide for payment of any solatium to the expropriated owner, two exceptions to this general position are allowed by the 44th Amendment in two cases of *acquisition:*

(a) If the property acquired belongs to an educational institution established and administered by a *minority,* the law of acquisition must provide for such compensation as would not abrogate the right of a minority 'to establish and administer educational institution', which is guaranteed by Art. 30(1). Shorn of innuendo, this means that if the State chooses to acquire a minority educational institution, it must offer full market value or adequate compensation so that the minority community may set up that institution at a suitable alternative site.

(b) If the State seeks to acquire the land which is *personally cultivated* by the owner and such land does not exceed the statutory *ceiling*, the State must pay to such owner full market value of his land as well as any building or structure standing thereon or appurtenant thereto. Though both the foregoing exceptions may be beneficial so far as they go, there is much to comment from the standpoint of constitutional law as from the national standpoint.

(i) As regards the concession in favour of a minority educational institution,—it is somewhat inexplicable why no such guarantee should be made in favour of educational institutions managed by members of a *majority* community. Is not education as pure and adorable whether it comes through the Ganges or the Jordan? In their over-zealousness for the addition of a special guarantee in favour of the minority which the fathers of the original Constitution did not envisage,[197] the fathers of the 44th Amendment took no time to ponder that by eliminating Art. 31(2), they were taking away a right which had been guaranteed to all persons in India. Legally speaking, the new provision in Art. 30(1A) is a tail which has lost its head by the repeal of Art. 31(2).[197]

(ii) As to the right of a small tiller of land to full compensation for his land and building or other structures, one fails to understand why similar right should not be guaranteed to a poorer man who has not an inch of agricultural land but has a humble hut to lay his head at night. He may be a day labourer, a petty pensioner or a landless peasant who tills another man's land. Are they less deserving?

Would it not be pertinent to point out in this context that even in the 1977-Constitution of the USSR, there was Art. 13 which stated[198]—

> " . . . The personal property of citizens of the USSR may include articles of everyday use, personal consumption and convenience, the implements and other objects of a small holding . . .or for building an *individual dwelling.* The personal property of citizens and the right to inherit it are *protected by the State. . .*"

In short, in the USSR, every individual had the guaranteed right to hold and inherit a dwelling, irrespective of his being an agriculturist, and the duty of the State to protect this right would obviously mean that the State cannot acquire or deprive the owner of his dwelling house unless otherwise provided by the Constitution.

The over-zealous political leaders of India should know that the provision in the 1982-Constitution of the *Chinese* Republic, too, is in the same strain. Though Art. 6 provides for social ownership of the 'means of production', Art. 13, at the same time guarantees to the individual to own personal property, acquired by his personal income:

> "The *State protects* the right of citizens to own lawfully earned income, savings, *houses* and other *lawful property.*"

Article 39, further, declares, as a fundamental right, that

> "The citizens'. . . *homes* are inviolable."

The net result of the foregoing provisions seems to be that the State cannot take away an individual's dwelling house and similar personal property, even by legislation, so that no question of compensation for compulsory acquisition may arise.

In view of the drastic effects of the abolition of Arts. 19(1)(f) and 31(2), some jurists in *India* have put forth their belief that the Supreme Court would come to the rescue of the expropriated owners by holding that notwithstanding the omission of such constitutionally guaranteed right to compensation, the Court would derive such right from the legislative power contained in Entry 42 of List III—'Acquisition and requisitioning of property', read with the common law doctrine of 'Eminent Domain'. Unfortunately, it has not been possible for the Author to persuade himself to this anachronistic assumption for reasons which have been elaborately given in the Author's bigger works.[198]

In the circumstances, there is a case for restoration of *some* relief for the poorer sections of property-owners (as distinguished from capitalists or owners of the means of production). But such relief can be more easily brought about by a further amendment of the Constitution than leaving it to the off-chances of 'judicial amendment'.

Art. 32: Constitutional Remedies For Enforcement of Fundamental Rights.

Abstract declarations of fundamental rights in the Constitution are useless, unless there is the *means* to make them effective. Constitutional experience in all countries shows that the reality of the existence of such rights is tested only in the Courts.

The power of the Courts to enforce obedience to the fundamental rights, again, depends not only upon the impartiality and independence of the Judiciary, but also upon the effectiveness of the instruments available to it to compel such obedience against the Executive or any other authority. Under the Anglo-American system, such means have been found in the writs or judicial processes such as *habeas corpus, mandamus,* prohibition, *certiorari* and *quo warranto.*

The Indian Constitution lays down the following provisions for the enforcement of the Fundamental Rights guaranteed by the Constitution, in the light of the above experience:

(a) The Fundamental Rights are guaranteed by the Constitution not only against the action of the Executive but also against that of the Legislature. Any act of the Executive or of the Legislature which takes away or abridges any of these rights shall be void and the Courts are empowered to declare it as void [*Art.* 13]. The Supreme Court strikes at the arbitrary action of the State.[199] It has jurisdiction to enforce the fundamental rights against private bodies and individuals and award compensation for violation of the fundamental rights. It can exercise its jurisdiction *suo motu* or on the basis of PIL.[200]

(b) Apart from the power to treat a law as void for being in contravention of the provisions of the Constitution guaranteeing the fundamental rights, the Judiciary has been armed with the power to issue the writs mentioned above (*habeas corpus, etc.*), in order that it may enforce such rights against any authority in the State, at the instance of an individual whose right has been violated.

The power to issue these writs for the enforcement of the Fundamental Rights is given by the Constitution to the Supreme Court and High Courts [*Arts.* 32 and 226].

(c) The rights so guaranteed shall not be suspended except during a Proclamation of Emergency,—in the manner laid down by the Constitution [*Art.* 359].

Special Features of the Jurisdiction of the Supreme Court under Art. 32.

Though a fundamental right may be enforced by other proceedings, such as a declaratory suit under the ordinary law or an application under Art. 226 or by way of defence to legal proceedings brought against an individual, a proceeding under Art. 32 is described by the Constitution as a 'constitutional remedy' for the enforcement of the Fundamental Rights included in Part III and the right to bring such proceeding before the Supreme Court is itself a fundamental right in Part III.

Article 32 is thus the cornerstone of the entire edifice set up by the Constitution. Commenting on this Article, in the Constituent Assembly,[201] Dr. Ambedkar said—

> "If I was asked to name any particular article of the Constitution as *the most important*—an article *without which this* Constitution *would be a nullity*—I would not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it."

The relevant provisions in Cls. (1) and (2) of Art. 32 should be noticed:

> "(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
>
> (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* whichever may be appropriate for the enforcement of any of the rights conferred by this Part."

(a) Art. 32, thus, provides a guaranteed remedy for the enforcement of those rights, and this remedial right is itself made a fundamental right, being included in Part III.[202] The Supreme Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such right, on technical grounds.[203] Thus, though a writ may ordinarily be refused on the ground that the Petitioner has another adequate legal remedy open to him, an application under Art. 32 cannot be refused merely on this ground where a fundamental right appears to have been infringed.[204]

(b) The Supreme Court can make any order appropriate to the circumstances, unfettered by the technicalities of the English 'Prerogative writs'.[204]

On the other hand,—

The sole object of Art. 32 is the enforcement of the fundamental rights guaranteed by the Constitution. Whatever other remedies may be open to a person aggrieved, he has no right to complain under Art. 32, where no 'fundamental' right has been infringed. For the same reason, no question other than relating to a fundamental right will be determined in a proceeding under Art. 32.[205]

'Prerogative Writs'.

The expression 'prerogative writ' is one of *English* common law which refers to the extraordinary writs granted by the Sovereign, as fountain of justice, on the ground of inadequacy of ordinary legal remedies. In course of time these writs came to be issued by the High Court of Justice as the agency through which the Sovereign exercised his judicial powers and these prerogative writs were issued as extraordinary remedies in cases where there was either no remedy available under the ordinary law or the remedy available was inadequate. These writs are—*habeas corpus, mandamus,* prohibition, *certiorari* and *quo warranto.*

Difference between the Jurisdiction of the Supreme Court and the High Courts to issue writs.

In a sense, the power of the High Courts to issue these writs is wider than that of the Supreme Court inasmuch as under Art. 32 of the Constitution the Supreme Court has the power to issue these writs only for the purpose of enforcement of the Fundamental Rights whereas under Art. 226 a High Court can issue these writs not only for the purpose of enforcement of Fundamental Rights but also for the redress of any other injury or illegality, owing to contravention of the *ordinary law,* provided certain conditions are satisfied, for which, see Chap. 20, *post.*[206]

Thus,—(a) an application to a High Court under Art. 226 will lie not only where a Fundamental Right has been infringed but also where some other limitation imposed by the Constitution, outside Part III, has been violated, *e.g.,* where a State Legislature has imposed a sales tax in contravention of the limitations imposed by Art. 286.[207] But an application under Art. 32 shall not lie in any case unless the right infringed is a 'Fundamental Right' enumerated in Part III of the Constitution.[205]

(b) Another point of distinction between the two jurisdictions is that while the Supreme Court can issue a writ against any person or Government within the territory of India, a High Court can, under Art. 226, issue a writ against any person, Government or other authority only if such person, Government or authority is physically resident or located within the territorial jurisdiction of the High Court, that is, within the State to which the territorial jurisdiction of the particular High Court extends or if the cause of action arises within such jurisdiction.[208]

As stated earlier, the Supreme Court has been assigned by the Constitution a special role as "the protector and guarantor of fundamental rights,"[201] by Art. 32(1).

In order to invoke the jurisdiction under Art. 32 to approach the Supreme Court directly, it has to be shown as to why the High Court had not been approached, could not be approached or it was futile to approach the High Court.[209]

The Supreme Court as the guardian of Fundamental Rights.

Where, therefore, the infringement of a fundamental right has been established, the Supreme Court cannot refuse relief under Art. 32 on the ground—

(a) That the aggrieved person may have his remedy from some other Court or under the ordinary law;[210] or

(b) That disputed facts have to be investigated or evidence has to be taken before relief may be given to the petitioner;[201] or

(c) That the petitioner has not asked for the proper writ applicable to his case. In such a case, the Supreme Court must grant him the proper writ and, if necessary, modify it to suit the exigencies of the case.[201]

(d) Generally only the person effected may move the Court but the Supreme Court has held that in social or public interest actions, any person may move the Court. This is called expansion of the 'right to be heard'. It favours Public Interest Litigation.[202] Following English and American decisions, the Supreme Court has admitted exceptions from the strict rules relating to affidavit *locus standi* and the like in the case of a class of litigations classified as 'public interest litigation' (PIL) *i.e.*, where the public in general are interested in the vindication of some right or the enforcement of some public duty.[211]

Another consequence which results from the guarantee of the constitutional remedy under Art. 32 is this:

Not only is this remedy immune from being overridden by legislation but any law which renders *nugatory* or *illusory* the Supreme Court's power to grant this remedy shall be void. This was illustrated in the leading case of *A.K. Gopalan* v. *State of Madras*,[119, 212] where the Supreme Court invalidated s. 14 of the Preventive Detention Act, 1950, as it originally stood. The section was as follows:

> "(1) No Court shall, except for the purpose of a prosecution for an offence punishable under sub-section (2), allow any statement to be made or any evidence to be given before it or the substance of any communication made under section 7 of the grounds on which a detention order has been made against any person or of any representation made by him against such order; and notwithstanding anything contained in any other law, no Court shall be entitled to require any public officer to produce before it, or to disclose the substance of, any such communication or representation made, or the proceedings of an advisory board or that part of the report of an advisory board which is confidential.
>
> (2) It shall be an offence punishable with imprisonment for a term which may extend to one year, or with fine, or with both for any person to disclose or publish without the previous authorisation of the Central Government or the State Government, as the case may be, any contents or matter purporting to be contents of any such communication or representation as is referred to in sub-section (1) . . . ."

The Supreme Court struck down the above provision on the ground that it contravened Art. 32 by way of preventing the Supreme Court from *effectively exercising* its powers under Art. 32. The following observations of MAHAJAN J. are illuminating:

> "This section is in the nature of an iron curtain around the acts of the authority making the order of preventive detention. The Constitution has guaranteed to the detained person the right to be told the grounds of detention. He has been given a right to make a representation [*Vide* article 22(5)], yet section 14 *prohibits the disclosure of the grounds furnished to him or the contents of the representation made by him in a Court of law* and makes a breach of this injunction punishable with imprisonment.
>
> Now it is quite clear that if an authority passes an order of preventive detention for reasons not connected with any of the six subjects mentioned in the 7th

> Schedule, this court can always declare the detention illegal and release the detenu, but it is not possible for this court to function if there is a prohibition against disclosing the grounds which have been served upon him. It is only by an examination of the grounds that it is possible to say whether the grounds fall within the ambit of the legislative power contained in the Constitution or are outside its scope. Again something may be served on the detenu as being grounds which are not grounds at all. In this contingency it is the right of the detained person under article 32 to move this court for enforcing the right under Article 22(5) that he be given the real grounds on which the detention order is based. This Court would be disabled from exercising its functions under article 32 and adjudicating on the point that the grounds given satisfy the requirements of the sub-clause if it is not open to it to see the grounds that have been furnished. It is a guaranteed right of the person detained to have the very grounds which are the basis of the order of detention. This court would be entitled to examine the matter and to see whether the grounds furnished are the grounds on the basis of which he has been detained or they contain some other vague or irrelevant material. The whole purpose of furnishing a detained person with the grounds is to enable him to make a representation refuting these grounds and of proving his innocence. In order that this Court may be able to safeguard this fundamental right and to grant him relief *it is absolutely essential that the detenu is not prohibited under penalty of punishment to disclose the grounds to the Court and no injunction by law can be issued to this Court disabling it from having a look at the grounds.* Section 14 creates a substantive offence if the grounds are disclosed and it also lays a duty on the court not to permit the disclosure of such grounds. *It virtually amounts to a suspension of a guaranteed right* provided by the Constitution inasmuch as it indirectly by a stringent provision makes administration of the law by this court impossible and at the same time it deprives a detained person from obtaining justice from this court. In my opinion, therefore, this section when it prohibits the disclosure of the grounds contravenes or abridges the rights given by Part III to a citizen and is *ultra vires* the powers of Parliament to that extent."[212]

There is provision in the Constitution for empowering courts other than the Supreme Court or the High Courts to issue the writs, by making a law of Parliament. But no such law has yet been passed,—with the result that no courts other than the Supreme Court or the High Courts have got the power to issue these writs. The incidents of the several kinds of writs which *our* Supreme Court and the High Courts are authorised by the Constitution to issue may now be noted.

Scope of the Writs:
1. *Habeas corpus.*

A writ of *habeas corpus* is in the nature of an order calling upon the person who has detained another to produce the latter before the Court, in order to let the Court know on what ground he has been confined and to set him free if there is no legal justification for the imprisonment. The words '*habeas corpus*' literally mean 'to have a body'. By this writ, therefore, the court secures the body of a person who has been imprisoned to be brought before itself to obtain knowledge of the reason why he has been imprisoned and to set him free if there is no lawful justification for the imprisonment. The writ may be addressed to any person whatever, an official or a private person, who has another person in his custody and disobedience to the writ is met with punishment for contempt of court. The writ of *habeas corpus* is thus a very powerful safeguard to the subject against arbitrary acts not only of private individuals but also of the executive. *Habeas corpus* petition becomes infructuous if the detenu is produced before the Magistrate.[213]

The different purposes for which the writ of *habeas corpus* is available may, accordingly, be stated as follows:

(a) For the enforcement of fundamental rights. It has already been explained that under *our* Constitution the right of personal liberty is guaranteed against the State by Art. 21 which says that 'no person shall be deprived of his life or personal liberty except according to procedure established by law'. Hence, if the Executive has arrested and detained any person without the authority of any law or in contravention of the procedure established by the law which authorises the detention, or the law which authorises the imprisonment is itself invalid or unconstitutional, the High Court or the Supreme Court may issue a writ of *habeas corpus* against the authority which has kept the person in custody and order the release of the person under detention.

(b) It will also issue where the order of imprisonment or detention is *ultra vires* the statute which authorises the imprisonment or detention.[214]

The writ of *habeas corpus* is, however, *not* issued in the following cases:

(i) Where the person against whom the writ is issued or the person who is detained is not within the jurisdiction of the Court.

(ii) To secure the release of a person who has been imprisoned by a court of law on a criminal charge.[215]

(iii) To interfere with a proceeding for contempt by a Court of record or by Parliament.

II. *Mandamus*.

Mandamus literally means a command. It demands some activity on the part of the body or person to whom it is addressed. In short, it commands the person to whom it is addressed to perform some public or quasi-public legal duty which he has refused to perform and the performance of which cannot be enforced by any other adequate legal remedy. It is, therefore, clear that *mandamus* will not issue unless the applicant has a legal right to the performance of legal duty of a *public* nature and the party against whom the writ is sought is bound to perform that duty. It is a discretionary remedy and the High Court may refuse to grant *mandamus* where there is an alternative remedy for redress of the injury complained of. In the matter of enforcement of fundamental rights, however, the question of alternative remedy does not weigh so much with the Court since it is the *duty* of the Supreme Court or the High Court to enforce the fundamental rights. In India, *mandamus* will lie not only against officers and other persons who are bound to do a public duty but also against the Government itself for, Arts. 226 and 361 provided that appropriate proceedings may be brought against the Government concerned. The writ is also available against inferior courts or other judicial bodies when they have refused to *exercise their jurisdiction* and thus to perform their duty. The purposes for which a writ may be issued may now be analysed as follows:

(a) For the enforcement of fundamental rights. Whenever a public officer or a Government has done some act which violates the fundamental right of a person, the Court would issue a writ of *mandamus* restraining the public officer or the Government from enforcing that order or doing that act against the person whose fundamental right has been infringed. Thus, where the petitioner, who was otherwise eligible for appointment to the Subordinate Civil Judicial Service, was not selected owing to the operation of a 'Communal Rotation Order' which infringed the fundamental right guaranteed to the petitioner by Art. 16(1), the Court issued an order directing the State of Madras "to consider and dispose of the petitioner's application for the post after taking it on the file on its merits and without applying the rule of communal rotation".[216]

(b) Apart from the enforcement of fundamental rights, *mandamus* is available from a High Court for various other purposes, *e.g.*,—

(i) To enforce the performance of a statutory duty where a public officer has got a power conferred by the Constitution or a statute. The Court may issue a *mandamus* directing him to exercise the power in case he refuses to do it.

(ii) The writ will also lie to compel any person to perform his public duty where the duty is imposed by the Constitution or a statute or statutory instrument.

(iii) To compel a court or judicial tribunal to exercise its jurisdiction when it has refused to exercise it.

(iv) To direct a public official or the Government *not* to enforce a law which is unconstitutional.

The Courts are normally reluctant to issue any direction to government for making a law.[217]

Mandamus will not be granted against the following persons:

(i) The President, or the Governor of a State, for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties [*Art.* 361, *post*].

(ii) *Mandamus* does not lie against a private individual or body whether incorporated or not except where the State is in collusion with such private party,[215] in the matter of contravention of any provision of the Constitution, or a statute or a statutory instrument.[218]

III. *Prohibition.*

The writ of prohibition is a writ issued by the Supreme Court or a High Court to an inferior court forbidding the latter to continue proceedings therein in excess of its jurisdiction or to usurp a jurisdiction with which it is not legally vested. In other words, the object of the writ is to compel inferior courts to keep themselves within the limits of their jurisdiction. The writ of prohibition differs from the writ of *mandamus* in that while *mandamus* commands activity, prohibition commands inactivity. Further, while *mandamus* is available not only against judicial authorities but also against administrative authorities, prohibition as well as *certiorari* are issued only against judicial or *quasi-judicial* authorities. Hence, prohibition is not available against a public officer who is not vested with judicial functions. Where excess of jurisdiction is apparent on the face of the proceedings, a writ of prohibition is not a matter of discretion but may be had *of right*. In India, a writ of prohibition may be issued not only in cases of absence or excess of jurisdiction but also in cases where the court or tribunal assumes jurisdiction under a law which itself contravenes some fundamental right guaranteed by the Constitution. The Supreme Court can issue the writ only where a fundamental right is affected by reason of the jurisdictional defect in the proceedings.

Though prohibition and *certiorari* are both issued against Courts or tribunals exercising judicial or *quasi-judicial* powers, *certiorari* is issued to *quash* the order or decision of the tribunal while prohibition is issued to *prohibit* the tribunal from making the *ultra vires* order or decision. It follows, therefore, that while prohibition is available during the pendency of the proceedings and before the order is made, *certiorari* can be issued only after the order has been made.

IV. *Certiorari.*

Briefly speaking, therefore, while prohibition is available at an earlier stage, *certiorari* is available at a later stage, on similar grounds. The object of both is to secure that the jurisdiction of an inferior court or tribunal is properly exercised and that it does not usurp the jurisdiction which it does not possess.

The conditions necessary for the issue of the writ of *certiorari* are—

I. There should be a tribunal or officer having legal authority to determine questions affecting rights of subjects and having a duty to act judicially.

II. Such tribunal or officer must have acted without jurisdiction or in excess of the legal authority vested in such *quasi-judicial* authority, or in contravention of the rules of natural justice or there is an 'error apparent on the face of its record'.

III. The Supreme Court, early, took the view that the writ of *certiorari* would not issue against purely administrative action. It would issue only if the authority has a *duty* to proceed judicially, that is to say, to come to a decision after hearing the parties interested in the matter and without reference to any extraneous consideration.[219]

But later decisions have obliterated the distinction between administrative and quasi-judicial bodies. The *current view* is that even if the governing statute does not require that before making an order affecting an individual, he must be heard, such a requirement would be implied by the Court where the right of property or some other civil right of the individual is affected. To omit to do this is to deny natural justice, and in such cases, the Court may quash the so-called administrative decision, by means of a writ of *certiorari,* under Art. 226.[220]

IV. A tribunal may be said to act without jurisdiction in any of the following circumstances—

(a) Where the court is not properly constituted, that is to say, where persons who are not qualified to sit on the tribunal have sat on it and pronounced the decision complained against.

(b) Where the subject-matter of enquiry is beyond the scope of the tribunal according to the law which created it.

(c) Where the court has assumed a jurisdiction on the basis of a wrong decision of facts upon the existence of which the jurisdiction of the tribunal depends.

(d) Where there has been a failure of justice either because the tribunal has violated the principles of natural justice or because its decision has been obtained by fraud, collusion or corruption.

V. When the decision of an inferior tribunal is vitiated by an error 'apparent on the face of the record', it is liable to be quashed by *certiorari,* even though the Court may have acted within its jurisdiction. 'Error', in this context, means 'error of *law*'. Where the Tribunal states on the face of the order the grounds on which they made it and it appears that in law these grounds were not such as to warrant the decision to which they had come, *certiorari* would issue to quash the decision.[221]

In all such cases a High Court can issue a writ of *certiorari* to quash the decision of the inferior tribunal; and the Supreme Court can also issue the writ in such cases, provided some fundamental right has also been infringed by the order complained against.

V. *Quo warranto.*

Quo warranto is a proceeding whereby the court enquires into the legality of the claim which a party asserts to a public office, and to oust him from its enjoyment if the claim be not well founded.

The conditions necessary for the issue of a writ of *quo warranto* are as follows:

(i) The office must be public and it must be created by a statute or by the constitution itself.

(ii) The office must be a substantive one and not merely the function or employment of a servant at the will and during the pleasure of another.

(iii) There has been a contravention of the Constitution or a statute or statutory instrument, in appointing such person to that office.[222]

The fundamental basis of the proceeding of *quo warranto* is that the public has an interest to see that an unlawful claimant does not usurp a public office. It is, however, a discretionary remedy which the Court may grant or refuse according to the facts and circumstances of each case. A writ of *quo warranto* may, thus, be refused where it is vexatious or where it would be futile in its result or where the petitioner is guilty of laches or where there is an alternative remedy for ousting the usurper. Where the application challenges the validity of an appointment to a public office, it is maintainable at the instance of *any* person, whether any fundamental or other legal right of such person has been infringed or not.

A writ of *quo warranto* lies against the person who is not entitled to hold an office of public nature and is only an usurper of the office. Such a person is required to show, by what authority he is entitled to hold that office. The challenge can be made on the grounds such as he does not fulfil the required qualifications or suffers from any disqualification debarring him to hold such office.[223]

Quo warranto is thus a very powerful instrument for safeguarding against the usurpation of public offices.

Parliament's power to modify or restrict Fundamental Rights.

The limitations upon the enforcement of the Fundamental Rights are as follows:

(i) Parliament shall have the power to modify the application of the Fundamental Rights[224] to the members of the Armed Forces, Police Forces or intelligence organisations so as to ensure proper discharge of their duties and maintenance of discipline amongst them [*Art.* 33].

In exercise of this power, Parliament has enacted the Army and Air Force Acts of 1950 and the Navy Act, 1957, which empower the Central Government to make Rules restricting the fundamental rights of the defence personnel, for the sake of discipline,—which is absolutely essential to maintain the security of India. By a Circular issued under such Rules, Government of India has ordered that no concession can be offered in favour of any member of the Defence Forces for the purpose of offering prayers during *office hours.* It is a pity that a fundamentalist Muslim Organisation, named All India Muslim Forum, has raised objection against the Circular articulated by Muslim members in Parliament, on various grounds. None of these grounds are, however, tenable in view of the express provision in Art. 33 of the Constitution of India, which silences the argument that no such restriction was imposed in respect of Muslims during the British regime and also that it would hurt the 'sentiments' of the Muslims. Nor does the argument that the withdrawal of such concession would be contrary to the guarantee of secularism hold water because, *firstly,* Art. 25(1) makes it 'expressly' subject to the *other* provisions of this Part, in which Art. 33 is included, *Secondly,* what Art. 25 guarantees is equality of treatment as amongst different religions. If no such concession exists in favour of the members of any other religion, no question of discrimination against Muslims can possibly arise. Above all, the defence of the nation is a *secular* duty of each citizen of India, regardless of his religious beliefs or rites. Nothing can be allowed by the independent Republic which can possibly jeopardise the defence of the Nation.

Needless to say, this dangerous move should be nipped in the bud before it assumes an uncontrollable situation, in the name of Muslims 'sentiment'. Any softness shown to it would be *anti-national.*

A similar instance was the claim of a section of Muslims to postpone the elections fixed for February, 1995, on the ground of Ramzan. This has, of course, been turned down by the Election Commission on the ground that no such religious plea can stop the electoral process. It is also doubtful if there is any religious scripture which requires Muslims to suspend their normal duties on the days of fasting, which is spread over one month.

(ii) When martial law has been in force in any area, Parliament may, by law, indemnify any person in the service of the Union or a State for any act done by him in connection with the maintenance or restoration of order in such area or validate any sentence passed or act done while martial law was in force [*Art.* 34].

Suspension of Fundamental Rights during Proclamation of Emergency.

(iii) The fundamental rights guaranteed by the Constitution will remain suspended, while a Proclamation of Emergency is made by the President under Art. 352 [see *post*]. The effect of such Proclamation in this behalf is twofold—

(a) As soon as a Proclamation of Emergency is made, the State shall be freed from the limitations imposed by Art. 19. This means that the Legislature shall be competent to make any law and the Executive shall be at liberty to take any action, even though it contravenes or restricts the right of freedom of speech and expression, assembly, association, movement, residence, profession or occupation. So far as these rights are concerned, the citizen shall thus have no protection against the executive or legislative authorities during the operation of the Proclamation of Emergency. The enlargement of the power of the State under Art. 358 will continue only so long as the Proclamation itself remains in operation; Art. 19 will revive as soon as the Proclamation expires. But the citizen shall have no remedy for acts done against him during the period of the Proclamation, in violation of the above rights [*Art.* 358].

(b) The other consequence depends upon the issue of a further Order by the President. Where a Proclamation of Emergency is in operation, the President may be Order declare that the right *to move a Court* for the enforcement of any of the Fundamental Rights shall remain *suspended* for the period during which the Proclamation remains in force [*Art.* 359]. In such a case, however, the right to move the Courts would be revived after the Proclamation ceases to be in force, or earlier, if so specified in the President's Order. In other words, if such an Order is issued, the Supreme Court and the High Courts shall be powerless to issue the prerogative writs or to make any other order for the enforcement of any fundamental right, including those which are conferred by Articles other than Art. 19 with the exception of those conferred by Arts. 20 and 21.

This Order of the President, however, shall not be final. Such Order shall, as soon as may be after it is made, be laid before each House of Parliament, and it will be within the competence of Parliament to disapprove of it.[225]

The 44th Amendment, 1978.

The 44th Amendment Act, 1978, has further provided that a law or executive order will be shielded under Art. 358 or 359 only if the law in question contains a recital to the effect that it has been made in relation to the Proclamation of Emergency; and the executive order has been issued under such law. *Secondly,* Arts. 20-21 *cannot* be suspended by any Order under Art. 359.

As the Constitution stands today, two other matters must be mentioned which limit the operation of the Fundamental Rights, as they were devised in the 1949-Constitution, and are not confined to times of 'Emergency' but operate *even in normal times.* These are:

I. The exceptions to Fundamental Rights; and

II. The Fundamental Duties.

Exceptions to Fundamental Rights.

I. Arts. 31A-31D, introduced by successive amendments, constitute exceptions to the application of Fundamental Rights, wholly, or partially.[6] Of these, Art. 31D has subsequently been repealed (by the 43rd Amendment Act, 1977).

Fundamental Duties.

II. The Fundamental Duties[226] are ten in number, incorporated in Art. 51A [Part IVA], which has been inserted by the *42nd Amendment* Act, 1976. Under this Article, it shall be the duty of every citizen of India—

(i) to abide by the Constitution and respect the National Flag and the National Anthem;
(ii) to cherish and follow the noble ideals which inspired our national struggle for freedom;
(iii) to protect the sovereignty, unity and integrity of India;
(iv) to defend the country;
(v) to promote the spirit of common brotherhood amongst all the people of India;
(*vi*) to preserve the rich heritage of our composite culture;
(*vii*) to protect and improve the natural environment;
(*viii*) to develop the scientific temper and spirit of inquiry;
(*ix*) to safeguard public property;
(*x*) to strive towards excellence in all spheres of individual and collective activity.
[227](xi) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

'Composite culture'.

In this context, it would be better to remove a misnomer involved in the expression 'composite culture' in Cl. (f) of Art. 51A. The Supreme Court has now pointed out that the foundation of this composite culture is the Sanskrit language and literature which is the great binding force "for the different peoples of this great country and it should be preferred in the educational system for the preservation of that heritage,—apart from the duty of the Government under Art. 351".[172]

To quote the Supreme Court—

> "Though the people of this country differed in a number of ways, they all were proud to regard themselves as participants in a *common* heritage, and that heritage, *emphatically,* is the heritage of Sanskrit".[173]

The reason is that the original population of India was Hindu. Thereafter this country was subjected to Muslim and British rule. Because of its wonderful tolerance, the Hindu culture imbibed these alien cultures and thus grew up a 'composite culture' in India [*Para* 118]:[174]

> "Hindu religion developed resilience to accommodate and imbibe with tolerance the cultural richness with religious assimilation and became a land of religious tolerance [*Para* 118][174] . . each religion made its contribution to enrich the *composite* Indian culture as a happy blend or synthesis. *Our* religious tolerance (thus) received reflections in *our Constitutional* creed [*Para* 126].[174]

Enforcement of Fundamental Duties.

Of course, there is no provision in the Constitution for direct enforcement of any of these Duties[228] nor for any sanction to prevent their violation. But it may be expected that in determining the constitutionality of any law, a Court finds that it seeks to give effect to any of these Duties, it may consider such law to be 'reasonable' in relation to Art. 14 or 19, and thus save such law from unconstitutionality. It would also serve as a warning to reckless citizens against anti-social activities such as burning the Constitution, destroying public property and the like.[229]

The Supreme Court has held that since the Duties are obligatory for a citizen, it would follow that the State should also strive to achieve the same goal. The Court may, therefore, issue suitable *directions* in these matters, in appropriate cases.[230]

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1. Report published in 1928 by a Committee headed by Pandit Motilal Nehru which was appointed by the All Parties Conference to outline the principles for a Constitution of India.
2. Author's *Human Rights in Constitutional Law* (Prentice-Hall of India, 1994, pp. 1, 41, 46).
3. GRANVILLE AUSTIN, *The Indian Constitution* (1966), p. 114.
4. This amendment, thus, silences that voice of the Judiciary which had been articulated, prior to 1978, through cases such as *Kochunni* v. *State of Madras,* AIR 1960 S.C. 1080 (*1092*); *Panipat Sugar Mills* v. *Union of India,* AIR 1973 S.C. 537; *Saraswati Syndicate* v. *Union of India,* AIR 1975 S.C. 460.
5. Cf. *Kesavananda* v. *State of Kerala,* AIR 1973 S.C. 1461 (*1554, 1606, 1637, 1776, 2051*); *State of Karnataka* v. *Ranganatha,* AIR 1978 S.C. 215 (*228*).
6. Art. 31D, which had been inserted by the Constitution (42nd Amendment) Act, 1976, has since been repealed by the 43rd Amendment Act, 1977.
7. See Author's *Constitutional Law of India* (1991, Prentice-Hall of India), pp. 109 *et seq.*
8. This is the result specifically provided for in Article 59 of the 1977-Soviet Constitution: "Citizens' exercise of their rights and freedoms is inseparable from the performance of their duties and obligations."
9. *A.K. Gopalan* v. *State of Madras,* (1950) S.C.R. 88.
10. This proposition has been buttressed by the decision in *A.D.M.* v. *Shukla,* AIR 1976 S.C. 1207, that the embodiment of certain rights as 'fundamental rights' in Part III of the Constitution has completely replaced the pre-Constitution rights founded on common law or otherwise; for instance, the right to personal liberty is exclusively contained in Art. 21 and the validity of any law depriving personal liberty, to-day, cannot be challenged on the ground of violation of any common law rule in that behalf (paras 61, 77, 83, 247, 264, 280). But the situation has been muddled because some Judges have asserted 'Rule of Law' to be a 'basic feature' of our Constitution,—apart from its specific and express provisions [*Indira* v. *Rajnarayan,* AIR 1975 S.C. 2299 (RAY, C.J., KHANNA., J., CHANDRACHUD, J.)].
11. E.g., right to travel abroad deduced from 'personal liberty' in Art. 21 [*Maneka* v. *Union of India,* AIR 1978 S.C. 597 (para 54), **affirming** *Satwant* v. *Asstt. Passport Officer,* AIR 1967 S.C. 1836 (*1844-45*)]; so also right to privacy deduced from Arts. 19(1)(d) and 21 [*Kharak Singh* v. *State of U.P.,* AIR 1963 S.C. 1295, **affirmed** in *Maneka's* case, *ibid.*]. Similarly, the rights to speedy trial and free legal aid have been deduced from Art. 21 [*Sheela* v. *Union of India,* AIR 1986 S.C. 1773; *Suk Das* v. *Arunachal Pradesh,* AIR 1986 S.C. 991].
12. *State of Kerala* v. *Joseph,* AIR 1958 S.C. 296; *Ghulam* v. *State of Rajasthan,* AIR 1963 S.C. 379.
13. *Bishamber* v. *State of U.P.,* AIR 1982 S.C. 33.
14. *Atiabari Tea Co.* v. *State of Assam,* AIR 1961 S.C. 232.
15. Excepting, of course, the non-justiciable rights, *e.g.,* the 'Directive Principles of State Policy', in Part IV.
16. *Syed Ahmed* v. *State of Mysore,* AIR 1975 S.C. 1443 (para 6); *Dt. Collector* v. *Ibrahim,* AIR 1970 S.C. 1275.
17. *Golak Nath* v. *State of Punjab,* AIR 1967 S.C. 1643. According to the majority in *Keshavananda* v. *State of Kerala,* AIR 1973 S.C. 1461, the 'basic [illegible]

amendable at all, though, curiously, Fundamental Rights are not included in the list of basic features as formulated by the majority.

18. *Shankari Prasad* v. *Union of India,* (1952) S.C.R. 89; *Sajjan Singh* v. *State of Rajasthan,* AIR 1965 S.C. 845.
19. *Ramesh Thappar* v. *State of Madras,* (1950) S.C.R. 594.
20. *Brij Bhushan* v. *State of Delhi,* (1950) S.C.R. 605.
21. *State of W.B.* v. *Subodh Gopal,* (1954) S.C.R. 587.
22. *Dwarkadas* v. *Sholapur Spinning Co.,* (1954) S.C.R. 674; *State of West Bengal* v. *Bela Banerjee,* (1954) S.C.R.558.
23. *Ram Narain* v. *State of Delhi,* S.C.R. 552.
24. Cf. *Maneka* v. *Union of India,* AIR 1978 S.C. 597 (paras 54-56, 63—a seven Judge Bench); *Sunil* v. *Delhi Admn.,* AIR 1978 S.C. 1675 (para 228); *Hussainara* v. *State of Bihar,* AIR 1979 S.C. 1360 (*1365*); *State of Maharashtra* v. *Champalal,* AIR 1981 S.C. 1675 (*1677*); *Sher Singh* v. *State of Punjab,* AIR 1983 S.C. 465.
25. *Bishan Das* v. *State of Punjab,* AIR 1961 S.C. 1570.
26. *Samdasani* v. *Central Bank,* (1952) S.C.R. 391.
27. *Ramana* v. *I.A.A.I.,* AIR 1979 S.C. 1628.
28. *Kochunni* v. *State of Madras (I),* AIR 1959 S.C. 725 (*730*).
29. *Dalmia Cement (Bharat) Ltd.* v. *Union of India,* (1996) 10 S.C.C. 104.
30. *Law of the Constitution,* 9th Ed., p. 202.
31. *Dalmia Cement (Bharat) Ltd.* v. *Union of India,* (1996) 10 S.C.C. 104.
32. *Ashutosh Gupta* v. *State of Rajasthan,* (2002) 4 SCC 34.
33. *Amita* v. *Union of India,* (2005) 13 SCC 721.
34. *Ashutosh Gupta* v. *State of Rajasthan,* (2002) 4 SCC 34. See also *Dharam Dutt* v. *Union of India,* AIR 2004 SC 1295.
35. *Ombalika Das* v. *Hulisa Shaw,* (2002) 4 SCC 539.
36. *T.M.A. Pai Foundation* v. *State of Karnataka,* (2002) 8 SCC 481.
37. *Panchayat Varga Shramajivi Samudaik Sahakari Khedut Cooperative Society* v. *Haribhai Mevabhai,* A.I.R. 1996 S.C. 2578.
38. *State of West Bengal* v. *Anwar Ali,* (1952) S.C.R. 289; *Ramana* v. *I.A.A.I.,* AIR 1979 S.C. 1628; *John Vallamation* v. *Union of India,* AIR 2003 SC 2902.
39. *T.M.A. Pai Foundation* v. *State of Karnataka,* (2002) 8 SCC 481.
40. *Onkar Lal Bajaj* v. *Union of India,* AIR 2003 SC 2562.
41. *State of A.P.* v. *Nallamilli Rami Reddi,* (2001) 7 SCC 708. See also *Dharam Dutt* v. *Union of India,* AIR 2004 SC 1295.
42. *John Vallamatom* v. *Union of India,* AIR 2003 SC 2902.
43. *Anukul Chandra Pradhan* v. *Union of India,* (1997) 6 S.C.C. 1.
44. *D.C. Bhatia* v. *Union of India,* (1995) 1 S.C.C. 104.
45. *State of Kerala* v. *Aravind Ramakant Modawdakar,* (1999) 7 S.C.C. 400 (para 6).
46. *State of U.P.* v. *Kamla Palace,* (2000) 1 S.C.C. 557 (para 12) : A.I.R. 2000 S.C. 617.
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49. *Ameeroonissa* v. *Mehboob,* (1953) S.C.R. 404 (*414*); *Pathumma* v. *State of Kerala,* AIR 1978 S.C. 771.
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55. *State of Bombay* v. *Balsara,* (1951) S.C.R. 682.
56. *S. Ramesha* v. *State of Karnataka,* A.I.R. 1998 S.C. 718.
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58. *Dutta Associates Pvt. Ltd.* v. *Indo Merchantiles Pvt. Ltd.*, (1997) 1 S.C.C. 53 (para 7).
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61. *Rakesh Kumar* v. *Sunil Kumar,* (1999) 2 S.C.C. 489 (para 21) : A.I.R. 1999 S.C. 9351.
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64. *Gurbachan* v. *State of Bombay,* (1952) S.C.R. 737 (*744*).
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68. *Delhi Development Authority* v. *Joint Action Committee, Allottee of SFS Flats,* (2008) 2 SCC 672 (para 43).
69. *Royappa* v. *State of T.N.,* AIR 1974 S.C. 555; *Ajay* v. *Khalid,* AIR 1981 S.C. 487; *Nakara* v. *Union of India,* AIR 1983 S.C. 130 (para 14).
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72. *Krishnan Kakkanth* v. *Government of Kerala,* (1997) 9 S.C.C. 495 (paras 35 to 38) : A.I.R. 1997 S.C. 128.
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77. *Dasaratha* v. *State of A.P.,* AIR 1961 S.C. 564 (*569*); *Devadasan* v. *Union of India,* AIR 1964 S.C. 179; *General Manager* v. *Rangachari,* AIR 1962 S.C. 36 (*40-41*).
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82. *Ibid* (paras 21 and 23).
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93. *Ajit Singh (II)* v. *State of Punjab,* (1999) 7 S.C.C. 209 (para 22).
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97. *E.V. Chinnaiah* v. *State of A.P.,* (2005) 1 SCC 394 (para 58).

98. Vide the Constitution (82nd Amendment) Act, 2000.
99. *Indra Sawhney* v. *Union of India,* (1992) Supp 3 S.C.C. 217 and *S. Vinod Kumar* v. *Union of India,* (1996) 6 S.C.C. 580.
100. *General Manager* v. *Rangachari,* AIR 1962 S.C. 36 (*42-44*).
101. *Balaji* v. *State of Mysore,* AIR 1963 S.C. 647 (*664*).
102. *Banarsidas* v. *State of U.P.,* (1956) S.C.R. 358 (*361-62*).
103. *Indra Sawhney* v. *Union of India,* (1992) Supp. (3) S.C.C. 217. Parliament has enacted the National Commission for Backward Classes Act, 1993, to set up a National Commission for backward classes. See also *Ashoka Kumar Thakur (8)* v. *Union of India,* (2007) 4 SCC 361.
104. *E.V. Chinnaiah* v. *State of A.P.,* (2005) 1 SCC 394 (para 38).
105. *S. Pushpa* v. *Sivachanmugavelu,* AIR 2005 SC 1038.
106. *Ewanlangki-E-Rymbai* v. *Jaintia Hills District Council,* AIR 2006 SC 1589.
107. *N. Adithayan* v. *Travancore Devaswom Board,* (2002) 8 SCC 106 (para 16).
108. At present the Government of India awards *decorations* for acts of gallantry, such as *Param Vir Chakra, Maha Vir Chakra, Vir Chakra.*
109. *Bala* v. *Union of India,* (1996) 1 S.C.C. 361 (paras 18-30, 32) C.B.
110. Sub-Cl. (f) of Art. 19(1) has been omitted by the Constitution (44th Amendment), 1978, w.e.f. 20-6-1979.
111. *Union of India* v. *Naveen Jindal,* (2004) 2 SCC 510 (para 37).
112. *Union of India* v. *Assn. for Democratic Reforms,* AIR 2002 SC 2112; *People's Union for Civil Liberties (PUCL)* v. *Union of India,* AIR 2003 SC 2363.
113. *People's Union for Civil Liberties (PUCL)* v. *Union of India,* AIR 2003 SC 2363; *People's Union for Civil Liberties* v. *Union of India,* AIR 2004 SC 1442.
114. *Noise Pollution (V), In re,* AIR 2005 SC 3136.
115. *Zoroastrian Coop. Housing Society Ltd.* v. *District Registrar, Coop. Societies (Urban),* AIR 2005 SC 2306.
116. *Secy. to Govt., T.N.* v. *K. Vinayagamurthy,* (2002) 7 SCC 104 (para 7).
117. *P.A. Inamdar* v. *State of Maharashtra,* AIR 2005 SC 3226.
118. *T.M.A. Pai Foundation* v. *State of Karnataka,* (2002) 8 SCC 481.
119. *Gopalan* v. *State of Madras,* (1950) S.C.R. 88 (*253-54*).
120. *Rajasthan State Electricity Board* v. *Mohan,* AIR 1967 S.C. 1856.
121. Sovereignty and Integrity of India were added as new grounds for the restriction of the freedoms of speech, assembly and association, by the Constitution (16th Amendment) Act, 1963. After this amendment, it would be competent for the Legislatures to combat movements like the D.M.K. movement in the South and the Plebiscite movement in *Kashmir* or parties advocating anarchism, by enacting appropriate laws. In pursuance of this amendment Parliament has enacted the Unlawful Activities (Prevention) Act, 1967 [see Author's *Law of the Press* (Prentice-Hall of India), 2nd Ed., pp. 455 *et seq.*].
122. *Ramesh Yeshwant Prabhoo (Dr.)* v. *Prabhakar Kashinath Kunte,* (1996) 1 S.C.C. 130 (paras 28 and 29) : A.I.R. 1996 S.C. 1113.
123. *Ibid.*
124. *Secretary, Ministry of Information & Broadcasting* v. *Cricket Association of Bengal,* (1995) 2 S.C.C. 161 (para 152) : A.I.R. 1995 S.C. 1236.
125. Under the Unlawful Activities (Prevention) Act, 1967 an association may be declared unlawful leading to banning of its activities. This can be done only after a tribunal presided over by a High Court judge upholds the validity of the declaration after hearing the association. Earlier National Socialist Council of Nagaland, Liberation Tigers of Tamil Eelam (LTTE), National Council of Khalistan and United Liberation Front of Assam (ULFA) were declared unlawful. Recently on 10-12-1992 the R.S.S., V.H.P., Bajrang Dal, Islamic Sevak Sangh and Jamait-e-Islami Hindi were declared unlawful. Justice Bahri tribunal has held that the ban on R.S.S. and Bajrang Dal is unjustified. Hence the notification pertaining to them has no effect.
126. *Qureshi* v. *State of Bihar,* (1959) S.C.R. 629.
127. *Dwarka Prasad* v. *State of U.P.,* (1954) S.C.R. 803.
128. *Chintamanrao* v. *State of M.P.,* (1950) S.C.R. 759; *State of Maharashtra* v. *Himmatbhai,* AIR 1970 S.C. 1157.

129. *State of Madras* v. *Row,* (1952) S.C.R. 597 (*607*); *Laxmi* v. *State of U.P.,* AIR 1981 S.C. 873. (This proposition is now to be read subject to the exceptions under Arts. 31B, 31C.)
130. *Khare* v. *State of Delhi,* (1950) S.C.R. 519; *Gurbachan* v. *State of Bombay,* (1952) S.C.R. 737 (*742*).
131. *M.R.F. Ltd.* v. *Inspector Kerala Govt.,* (1998) 8 S.C.C. 227 (para 13).
132. *Dwarka Prasad* v. *State of Uttar Pradesh,* (1954) S.C.R. 803; *A.P. Merchants' Association* v. *Union of India,* AIR 1971 S.C. 2346.
133. *Express Newspapers* v. *Union of India,* AIR 1958 S.C. 578.
134. In re: *Harijai Singh,* (1996) 6 S.C.C. 466 (para 10) : A.I.R. 1997 S.C. 73.
135. *Hindustan Times* v. *State of U.P.,* (2003) 1 SCC 591.
136. *Arundhati Roy, In re,* AIR 2002 SC 1375.
137. *Bennett Coleman* v. *Union of India,* AIR 1973 S.C. 106 [see Author's *Casebook on Indian Constitutional Law,* Vol. 1, pp. 207-49].
138. *Virendra* v. *State of Punjab,* AIR 1958 S.C. 986.
139. See Author's *Shorter Constitution of India,* 14th Ed., 2008.
140. *Brijbhushan* v. *State of Delhi,* (1950) S.C.R. 605; *Ramesh Thappar* v. *State of Madras,* (1950) S.C.R. 594 (*597*).
141. *Babulal* v. *State of Maharashtra,* AIR 1961 S.C. 884.
142. *Abbas* v. *Union of India,* AIR 1971 S.C. 481; see Author's *Casebook on Indian Constitutional Law,* Vol. I, P. 276.
143. As will be more fully explained in Chap. 25, *post,* the 44th Amendment Act, 1978, has amended Art. 352(1), omitting 'internal disturbance' therefrom, so that it will no longer be possible to make any Proclamation of Emergency on the ground of *internal disturbance.* A Proclamation of Emergency can hereafter be valid under Art. 352(1) only on the ground of (a) war; or (b) external aggression; or (c) *armed rebellion.*
144. *Kedar Nath* v. *State of W.B.,* (1954) S.C.R. 30. See also *Star India (P) Ltd.* v. *Commissioner of Central Excise, Mumbai & Goa,* (2005) 7 SCC 203 (para 7); *C. Gupta* v. *Glaxo-Smithkline Pharmaceuticals Ltd.,* (2007) 7 SCC 171 (para 23).
145. *Sakshi* v. *Union of India,* (2004) 5 SCC 518 (para 20).
146. *Venkataraman* v. *Union of India,* (1954) S.C.R. 1150. See also *Union of India* v. *Sunil Kumar Sarkar,* AIR 2001 SC 1092; *State of Punjab* v. *Dalbir Singh,* (2001) 9 SCC 212.
147. *O.P. Dahiya* v. *Union of India,* (2003) 1 SCC 122. See also *Shiv Parshad Pandey* v. *CBI,* AIR 2003 SC 1974.
148. *State of Rajasthan* v. *Hat Singh,* AIR 2003 SC 791; *State (NCT of Delhi)* v. *Navjot Sandhu,* (2005) 11 SCC 600.
149. *Sharma* v. *Satish,* (1954) S.C.R. 1077.
150. *State of Bombay* v. *Kathi Kalu,* AIR 1961 S.C. 1808. See also *State (NCT of Delhi)* v. *Navjot Sandhu,* (2005) 11 SCC 600.
151. *Maqbool* v. *State of Bombay,* (1953) S.C.R. 730.
152. *Narayanlal* v. *Maneck,* AIR 1961 S.C. 29 (*38*); *Veera* v. *State of Maharashtra,* AIR 1976 S.C. 1167.
153. *Ram Narain* v. *State of Bombay,* (1952) S.C.R. 652.
154. *Gopalan* v. *State of Madras,* (1950) S.C.R. 88; *Jaynarayan* v. *State of W.B.,* AIR 1970 S.C. 675.
155. *A.D.M.* v. *Shukla,* AIR 1976 S.C. 1207.
156. See Author's *Shorter Constitution of India,* 14th Ed., 2008 under Art. 21.
157. *Tarapada* v. *State of West Bengal,* (1951) S.C.R. 212, for the grounds on which the Courts can interfere with an order of detention, see Author's *Shorter Constitution of India,* 14th Ed., 2008 under Art. 22; *Constitutional Law of India.* 1991, pp. 84 *et. seq.*
158. *Emp.* v. *Sibnath,* AIR 1945 P.C. 156.
159. *Liversidge* v. *Anderson,* (1942) A.C. 206.
160. *Roly* v. *Union of India,* AIR 1982 S.C. 710 (paras 52, 113).
161. In order to cope with the increase in terrorist activities, Government was obliged to enact a temporary Act, viz. the Terrorist and Disruptive Activities (Prevention) Act, 1987 (called *TADA*). This Act has not been renewed after it lapsed, without affecting previous cases under the Act.

162. Some States have made laws authorising preventive detention relating to subject within their jurisdiction; *e.g.*, J & K. Public Safety Act, 1977; A.P. Detention Act, 1970; Rajasthan P.D. Act, 1970; U.P. Rashtra Virodhi Tatwa Nivaran Adhiniyam, 1970; West Bengal Prevention of Violent Activities Act, 1970; M.P. Security & Public Order Maintenance Act, 1980. Preventive detention is provided for by the following Central Acts; COFEPOSA, 1974; NASA, 1980. Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980.
163. *Sanjit* v. *State of Rajasthan,* AIR 1953 S.C. 328 (para 4); *People's Union* v. *Union of India,* AIR 1982 S.C. 1473 (paras 14-15).
164. A bold step towards the abolition of forced labour and of economic and physical exploitation of the weaker sections of the people has been taken by the enactment, by Parliament, of the Bonded Labour System (Abolition) Act, 1976.
165. *State of Gujarat* v. *Hon'ble High Court of Gujarat,* (1998) 7 S.C.C. 392 (paras 20 and 21) : A.I.R. 1998 S.C. 3164.
166. *M.C. Mehta* v. *State of T.N.,* (1991) 1 S.C.C. 283 (paras 5, 7, 8, 9 and 11).
167. *M.C. Mehta* v. *State of T.N.*, (1996) 6 S.C.C. 756 (paras 27-29) : A.I.R. 1997 S.C. 699 and *Bandhua Mukti Morcha* v. *Union of India,* (1997) 10 SCC 549 (para 12) : A.I.R. 1997 S.C. 2218.
168. *Commissioner, Hindu Religious Endowments* v. *Lakshmindra,* (1954) S.C.R. 1005.
169. *Hanif Quareshi* v. *State of Bihar,* AIR 1958 S.C. 731.
170. *Ratilal* v. *State of Bombay,* (1954) S.C.R. 1055.
171. *Sarup* v. *State of Punjab,* AIR 1959 S.C. 860 (*866*); *Moti Das* v. *Sahi,* AIR 1959 S.C. 942 (*950*); *Jagadiswaranand* v. *Police Commr.,* AIR 1984 S.C. 51 (para 10).
172. In the opinion of the Author, once it is held that Sanskrit is the foundation of the common heritage and culture of India, nothing stands in the way of making it a *compulsory* subject at *some* stage of a child's education—as it was in the British days.
173. *Santosh* v. *Ministry of H.R.D.,* (1994) 6 S.C.C. 579.
174. *Bommai* v. *Union of India,* AIR 1994 S.C. 1918. A 9-Judge Bench decision.
175. *Stainislaus* v. *State of M.P.,* AIR 1977 S.C. 908.
176. Owing to the dissolution of Parliament on the resignation of Sri Desai, Tyagi's Bill has lapsed. The Arunachal Bill has become law with President's assent, but no challenge against it in the Courts appears to have yet been made. [A registered letter addressed to the Pope John Paul enquiring of the scriptural authority to justify conversion against a person's free will, remains unanswered.]
177. *T.M.A. Pai Foundation* v. *State of Karnataka,* (2002) 8 SCC 481.
178. See Author's *Constitutional Law of India* (Prentice-Hall of India, 6th Ed., 1991), pp. 1, 3.
179. Nobody who has read Indian Constitutional History can afford to forget that it was the 'Communal Award' of 1932, providing for separate representation for the Muslims and non-Muslims, which ultimately led to the lamentable partition of India.
180. *St. Stephens College* v. *University of Delhi,* (1992) 1 S.C.C. 558.
181. *P.A. Inamdar* v. *State of Maharashtra,* AIR 2005 SC 3226.
182. *Usha Mehta* v. *State of Maharashtra,* (2004) 6 SCC 264.
183. *Secy., Malankara Syrian Catholic College* v. *T. Jose,* (2007) 1 SCC 386 (para 19). See also *P.A. Inamdar* v. *State of Maharashtra,* AIR 2005 SC 3226.
184. *Islamic Academy of Education* v. *State of Karnataka,* (2003) 6 SCC 697.
185. *Usha Mehta* v. *State of Maharashtra,* (2004) 6 SCC 264 (para 10).
186. *State of Bombay* v. *Balsara,* (1951) S.C.R. 682.
187. *Raghubir* v. *Court of Wards,* (1953) S.C.R. 1049.
188. *Wazir Chand* v. *State of H.P.,* AIR 1954 S.C. 415; *Virendra* v. *State of Punjab,* AIR 1957 S.C. 896.
189. *Dwarka* v. *State of Bihar,* AIR 1959 S.C. 249; *Virendra* v. *State of U.P.,* (1955) 1 S.C.R. 415.
190. *Kochunni* v. *State of Madras,* AIR 1960 S.C. 1080; *Kunnathat* v. *State of Kerala,* AIR 1961 S.C. 552.
191. For the text of Arts. 31-31D, as amended up-to-date, see Author's *Constitution Law of India* (Prentice-Hall of India, 1991), pp. 97ff. Of these, Art. 31D has been *omitted* by the Constitution (43rd Amendment) Act, 1977.

192. *State of W.B.* v. *Bela Banerjee,* (1954) S.C.R. 558 (*563*).
193. *Cooper* v. *Union of India,* AIR 1970 S.C. 564 (*608, 614*).
194. *Keshavananda* v. *State of Kerala,* AIR 1973 S.C. 1641.
195. *Minerva Mills* v. *Union of India,* AIR 1980 S.C. 1787.
196. A serious controversy has been raised as to whether, notwithstanding such repeal, a law can be struck down on the ground that it provides for *no* compensation or *illusory* compensation.

    In 1995, a Division Bench of the Supreme Court [*Jilubhai* v. *State of Gujarat,* AIR 1995 S.C. 142] has answered this question in the affirmative.
197. The Janata Government, which undertook to unwind the changes introduced by the Indira Government into the Constitution, forgot, in the present context, that there was no Proviso to Cl. (2) of Art. 31 in the original Constitution of 1949. In 1971, when the word 'compensation' was substituted by the word 'amount, by the same 25th Amendment Act, the Proviso was introduced by Mrs. Gandhi to safeguard the right of a minority educational institution to full compensation while all the world outside had no such right under the Constitution of India as amended by her Government. It is that Proviso which was nurtured by the Janata Government, by the 44th Amendment Act, while repealing Art. 31(2) itself.
198. Author's *Shorter Constitution of India,* 9th Ed., pp. 668ff.; *Comparative Constitutional Law,* pp. 184 *et seq.*
199. *R. Gandhi* v. *Union of India,* (1999) 8 S.C.C. 106 (para 13).
200. *Bodhisattawa Gautam* v. *Subhra Chakraborty,* (1996) 1 S.C.C. 490 (paras 6 and 7) : A.I.R. 1996 S.C. 922.
201. (1948) VII C.A.D. 953.
202. *Kochunni* v. *State of Madras (I),* AIR 1959 S.C. 725; *Kharak Singh* v. *State of U.P.,* AIR 1963 S.C. 1295; *Rashid Ahmed* v. *Municipal Board,* (1950) S.C.R. 566.
203. *Rural Litigation* v. *State of U.P.,* (1989) Supp. (1) S.C.C. 504 (para 16).
204. *Basappa* v. *Nagappa,* (1955) 1 S.C.R. 250; *Kharak Singh* v. *State of U.P.,* AIR 1963 S.C. 1295.
205. *Amar Singhji* v. *State of Rajasthan,* AIR 1965 S.C. 504.
206. It should be pointed out in the present context that by the 42nd Amendment Act, 1976, various conditions and limitations had been imposed on the writ jurisdiction of both the Supreme Court and the High Courts, by introducing provisions such as Arts. 32A, 131A, 144A, 226A, 228A, and substituting Art. 226 itself [see Author's *Constitution Amendment Acts,* pp. 100-07; 126-28]. All these fetters have since been removed by the 43rd and 44th Amendment Acts, 1977-78, brought by the Janata Government, so that the provisions in Arts. 32 and 226 have been *restored to their original condition.*

    But Arts. 323A and 323B, inserted in 1976, have been kept in tact. In pursuance of Art. 323A, the Administrative Tribunals Act has been enacted in 1985, by which service matters have been taken away from the jurisdiction of the High Courts under Art. 226, and vested in Administrative Tribunals, so far as Union Government servants are concerned [see, further, under Chap. 27, *post*] but subsequently in *L. Chandra Kumar* v. *Union of India,* (1997) 3 S.C.C. 261 (paras 62 and 76) the Supreme Court has declared the sections of the Arts. 323A and 323B and the legislations enacted in pursuance thereof infringing the powers of judicial review of the Supreme Court and the High Courts under Arts. 32 and 222/227 as unconstitutional.
207. *State of Bombay* v. *United Motors,* (1953) S.C.R. 1069.
208. See Cl. (1A), introduced in Art. 226, by the Constitution (15th Amendment) Act, which has been made Cl. (2), by the 42nd Amendment.
209. *Union of India* v. *Paul Manickam,* (2003) 8 SCC 342 (para 22).
210. *Himmatlal* v. *State of M.P.,* (1954) S.C.R. 1122.
211. *People's Union* v. *Union of India,* A.I.R. 1982 S.C. 1473 (para 1).
212. For the facts and principles of this decision of the Supreme Court and other leading cases, read Author's *Casebook on Indian Constitutional Law,* Vol. I, pp. 447 *et seq.*
213. *Harbans Kaur* v. *Union of India,* (1995) 1 S.C.C. 623 (para 16).
214. *Makhan Singh* v. *State of Punjab,* (1952) S.C.R. 368; *Keshav* v. *Commr. of Police,* (1956) S.C.R. 653.
215. *Janardhan* v. *State of Hyderabad,* (1951) S.C.R. 344.

216. *Venkataramana* v. *State of Madras,* AIR 1951 S.C. 229.
217. *Saurabh Chaudri* v. *Union of India,* (2003) 11 SCC 146 (para 77); *Networking of Rivers : In re,* (2004) 11 SCC 360 (para 8).
218. *Sohan Lal* v. *Union of India,* AIR 1957 S.C. 532.
219. *Province of Bombay* v. *Khusaldas,* (1950) S.C.R. 621.
220. *Kraipak* v. *Union of India,* AIR 1970 S.C. 150 (*156*); *Kesava Mills* v. *Union of India,* AIR 1973 S.C. 389 (paras 7-8); *D.F.O.* v. *Ram,* AIR 1973 S.C. 205; *Erusian Equipment* v. *State of W.B.,* AIR 1975 S.C. 266; *Joseph* v. *Executive Engineer,* AIR 1978 S.C. 930.
221. *Hari Vishnu* v. *Ahmad,* (1955) 1 S.C.R. 1104 (*1123*); *Nagendra* v. *Commr.,* AIR 1958 S.C. 398 (*412*).
222. The Supreme Court can issue this writ in a proceeding under Art. 32 only if a fundamental right has been violated by an appointment.
223. *R.P. Kapur* v. *State of T.N.,* (2001) 7 SCC 231.
224. Article 33 was amended by the Constitution (50th Amendment) Act, 1984. For the amended text of Art. 33 see Author's *Shorter Constitution of India,* 14th Ed., 2008.
225. As to Proclamation of Emergency and Orders made under Art. 359, see, further, under Emergency Provisions, Chap. 25, *post.*
226. It is interesting to note that the Author suggested at p. 289 of Vol. A of the 6th Ed. of the Commentary, that a separate part should be engrafted to incorporate fundamental duties.
227. Inserted by the Constitution (Eighty-sixth Amendment) Act, 2002, Sec. 4.
228. *Ramsharan* v. *Union of India,* AIR 1989 S.C. 549 (para 14).
229. See, further, Author's *Constitutional Law of India,* 6th Ed., 1991, pp. 134-35.
230. *Rural Litigation* v. *State of U.P.,* AIR 1987 S.C. 359 (para 20).

CHAPTER 9

DIRECTIVE PRINCIPLES OF STATE POLICY

PART IV of the Constitution [*Arts.* 36-51] contains the Directive Principles of State Policy.

Classification of the Directives.

As shown in Table VI, these principles may be classified under several groups:

(i) Certain ideals, particularly economic, which, according to the framers of the Constitution, the State[1] should strive for.

(ii) Certain directions to the Legislature and the Executive intended to show in what manner the State should exercise their legislative and executive powers.

(iii) Certain rights of the citizens which shall not be enforceable by the Courts like the 'Fundamental Rights', but which the State[1] shall nevertheless aim at securing, by regulation of its legislative and administrative policy.

Scope of the Directives.

It shall be the duty of the State[1] to follow these principles both in the matter of administration as well as in the making of laws. They embody the object of the State under the republican Constitution, namely, that it is to be a 'Welfare State' and not a mere 'Police State'. Most of these Directives, it will be seen, aim at the establishment of the economic and social democracy which is pledged for in the Preamble.

Nature of the Economic Democracy envisaged.

According to Sir Ivor Jennings,[2] the philosophy underlying most of these provisions is "Fabian Socialism without the socialism, for, only 'the nationalisation'[3] of the means of 'production, distribution and exchange' is missing". This much is clear, however, that *our* Constitution (as framed in 1949) did not adhere to any particular 'ism' but sought to effect a compromise between Individualism and Socialism by eliminating the vices of unbridled private enterprise and interest by social control and welfare measures as far as possible.

Socialistic pattern of society.

This is why a '*Socialistic pattern of society*', not '*socialism*', was declared to be the objective of our Planning by Pandit Nehru[4]:

> "Socialism to some people means two things: Distribution which means cutting off the pockets of the people who have too much money and nationalisation. Both these are desirable objectives, but neither is by itself Socialism.

> Any attempt to distribute by affecting the productive machinery is utterly wrong; to do so would be to weaken ourselves. The basis of Socialism is greater wealth; there cannot be any Socialism of poverty. Therefore, the process of equalisation has to be phased.
>
> Secondly, there is the question of nationalisation. I think it is dangerous merely to nationalise something without being prepared to work it properly. To nationalise we have to select things. My idea of Socialism is that *every individual in the State should have equal opportunity for progress.*"

Trends towards collectivism.

It must be mentioned, in this context, that the governmental policy, at the Union level, had demonstrated a greater bias towards collectivism during the regime of his daughter, Mrs. Indira Gandhi, and quite a number of industries, trades and other means of production were nationalised during the three decades since independence, either directly or through the agency of State-owned or State-controlled corporations, *e.g.*, banking, insurance, aviation, coal mines.

The 42nd Amendment.

It should, however, be mentioned that though the objective of the State has been described to be 'socialist', by the amendment of the Preamble by the *42nd Amendment* Act, Mrs. Gandhi had said that this socialism did not indicate collectivism, but the offering of equal opportunities to all through socio-economic reform.[5] By the same Amendment, certain other changes have been introduced in Part IV, adding *new* Directives, to accentuate the socialistic bias of the Constitution:

(i) Art. 39A has been inserted to enjoin the State to provide free legal aid to the poor and to take other suitable steps to ensure *equal justice* to all, which is offered by the Preamble.[6]

(ii) Art. 43A has been inserted in order to direct the State to ensure the participation of workers in the management of industry and other undertakings (this is what is known as 'profit-sharing'). This is a positive step in advancement of socialism in the sense of *economic* justice.[7]

The 44th Amendment.

The Janata Government sought to implement the promise of economic justice and equality of opportunity assured by the Preamble, by inserting Cl. (2) in Art. 38 (by the 44th Amendment Act, 1978), as follows:

> "(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."

This innocently-looking amendment is to be read along with elimination of the Fundamental Right to Property. They have paved the way for confiscatory taxation and for equalising salaries and wages for different vocations and different categories of work, which would usher in a socialistic society, even without resorting to nationalisation of the means of production.[7]

Art. 38 enjoins the State to strive to promote the welfare of the people by securing and protecting, as effectively as it may, the social order in which justice—social, economic and political—shall, inform all the institutions of national life striving to minimising inequalities in income and endeavour to eliminate inequalities in status, facilities, opportunities among individuals and groups of people residing in different areas or engaged in different avocations.[8]

The 86th Amendment.

The Constitution (Eighty-sixth Amendment) Act, 2002 substituted Art. 45 making provision for early childhood care and education to children below the age of six years in place of provision for free and compulsory education until they completed the age of fourteen years.

The Directives, however, differ from the Fundamental Rights contained in Part III of the Constitution or the ordinary laws of the land, in the following respects:

Directives compared with Fundamental Rights.

(i) While the Fundamental Rights constitute limitations upon State action, the Directive Principles are in the nature of instruments of instruction to the Government of the day to do certain things and to achieve certain ends by their actions.

(ii) The Directives, however, require to be implemented by legislation, and so long as there is no law carrying out the *policy* laid down in a Directive, neither the State nor an individual can violate any existing law or legal right under colour of following a Directive.

Non-justiciability.

(iii) The Directives are not enforceable in the Courts and do not create any justiciable rights in favour of the individuals.

From the standpoint of the individual, the difference between the Fundamental Rights and the Directives is that between justiciable and non-justiciable rights,—a classification which has been adopted by the framers of *our* Constitution from the Constitution of *Eire.* Thus, though the Directive under Art. 43 enjoins the State to secure a living wage to all workers, no worker can secure a living wage by means of an action in a Court, so long as it is not implemented by appropriate legislation. In other words, the Courts are not competent to compel the Government to carry out any Directive, *e.g.*, to provide for free compulsory education within the time limited by Art. 45 or to undertake legislation to implement any of the Directive Principles.

Conflict between Fundamental Rights and Directive Principles.

(iv) It may be observed that the declarations made in Part IV of the Constitution under the head 'Directive Principles of State Policy' are in many cases of a wider import than the declarations made in Part III as 'Fundamental Rights'. Hence, the question of priority in case of conflict between the two classes of provisions may easily arise. But while the Fundamental Rights are enforceable by the Courts [*Arts.* 32, 226(1)] and the Courts are bound to declare as void any law that is inconsistent with any of the 'Fundamental Rights', the Directives are not so enforceable by the Courts [*Art.* 37], and the Courts cannot declare as void any law which is otherwise valid, on the ground that it contravenes any of the 'Directives'. Hence, in case of any conflict between Parts III and IV of the Constitution, the former should prevail in the Courts.[9]

The foregoing general proposition, laid down by the Supreme Court in 1951,[9] must now, however, be read subject to a major exception. Article 31C, introduced in 1971 and expanded by the Constitution (*42nd Amendment*) Act, says that though the Directives themselves are not directly enforceable in the Courts, if any law is made to implement *any* of the *Directives* contained in Part IV of the Constitution, it would be totally immune from unconstitutionality on the ground of contravention of the fundamental rights conferred by Arts. 14 and 19.[10]

This attempt to confer a primacy upon the Directives as against the Fundamental Rights has, however, been foiled by the majority of the Supreme Court in the *Minerva Mills* case[11] in two respects:

(a) It has struck down the widening of Art. 31C to include *any or all* of the Directives in Part IV, on the ground that such total exclusion of judicial review would offend the 'basic structure' of the Constitution. In the result, Art. 31C is restored to its pre-1976 position, so that a law would be protected by Art. 31C only if it has been made to implement the directive in Art. 39(b)-(c) and not any of the other Directives included in Part IV.

(b) It has been also held that there is a fine balance in the original Constitution as between the Directives and the Fundamental Rights, which should be adhered to by the Courts, by a harmonious reading of the two categories of provisions, *instead of giving any general preference to the Directive Principles.*

It is also to be noted that outside these two[10] fundamental rights [in *Arts.* 14 and 19], the general proposition laid down in 1951[9] shall subsist. Thus, by way of implementing the Directive in Art. 45,—to provide free and compulsory education to children,—the State cannot override the fundamental right, under Art. 30(1), of minority communities to establish educational institutions of their own choice.[12]

It has been held that the fundamental rights and the directive principles are the two wheels of the chariot as an aid to make social and economic democracy a truism.[13]

Sanction behind the Directives.

Though these Directives are not enforceable by the Courts and, if the Government of the day fails to carry out these objects, *no Court* can make the Government ensure them, yet these principles have been declared to be "fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws" [*Art.* 37].

The sanction behind them is, in fact, *political.* As Dr. Ambedkar observed in the Constituent Assembly, "if any Government ignores them, they will certainly have to answer for them before the *electorate* at the election time".[14] It would also be a patent weapon at the hands of the Opposition—to discredit the Government on the ground that any of its executive or legislative acts is opposed to the Directive Principles. The author discerns a more effective sanction for enforcement of the Directives, which does not appear to have been properly appreciated in any quarters so far. Article 355 says—

Whether Arts. 355, 365, can be applied to enforce implementation of Directives by the States.

> "It shall be the *duty* of the *Union* . . . to ensure that the government of every State is carried on in accordance with the provisions of this Constitution."

Indisputably, Part IV (containing the Directive Principles) is a part of the Constitution. On the other hand, even though the Directives are not enforceable in the Courts of law, Art. 37 unequivocally enjoins that "it shall be the *duty* of the *State* to apply these principles in making laws".

If so, it should be the *duty* of the Union to see that every State takes steps for implementing the Directives, as far as possible. Hence, it should be competent for the Union to issue directions against particular States to introduce "free and compulsory education for children" [*Art.* 45], or to prevent "slaughter of cows, calves and other milch and draught cattle" [*Art.* 48], or to introduce "prohibition of consumption of alcoholic drinks" [*Art.* 47], and so on. In case of refusal to comply with such directions issued by the Union, it may apply Art. 365 against such recalcitrant State. Otherwise, the Directives in Part IV shall ever remain a dead-letter.

Utility of the Directives.

Owing to the legal deficiencies of the Directives the utility of their incorporation in the Constitution, which is a *legal* instrument, has been questioned from different quarters. Sir Ivor Jennings,[15] thus, characterised them as 'pious aspiration' and also questioned the utility of importing into India of the 19th Century English philosophy of 'Fabian socialism without the socialism'.

Prof. Wheare[16] has criticised them in stronger terms—

> "When one peruses the terms of these Articles one cannot deny that it would be *foolish* to allow Courts to concern themselves with these matters . . . It may be doubted whether there is any gain, on balance, in introducing these *paragraphs of generalities* into a Constitution anywhere at all, if it is intended that the Constitution should command the respect as well as affection of the people. If the Constitution is to be taken *seriously,* the interpretation and fulfilment of these general objects of policy will raise *great difficulties* for legislatures, and these difficulties will bring the Constitution, the Courts and the legislature into *conflict* and disrepute. If these declarations are, however, to be treated as 'words', they will bring discredit upon the Constitution also."[16]

Nevertheless, their incorporation in the Constitution has been justified by a consensus of opinion, as well as the working of the Constitution since 1950.

(i) Sir B.N. Rau, who advised the division of individual rights into two categories—those which were enforceable in the Courts and those which were not, stated that the latter class which are known in the Constitution as 'Directives' were intended as "*moral precepts* for the authorities of the State . . . they have at least an educative value". That educative value is to remind those in power for the time being that the goal of the Indian polity is to introduce 'socialism in the economic sphere' (*Panikkar*), or '*economic* democracy' as distinguished from '*political* democracy' (Ambedkar), which simply means 'one man one vote'. It reminds the authorities that they must ensure "social security and better standards of sanitation" and emphasise "the duty towards women and children and the obligations towards backward and tribal classes" (*Panikkar*).

Granville Austin[17] considers these Directives to be "aimed at furthering the goals of the social revolution or . . . to foster this revolution by establishing the conditions necessary for its achievement". He explains—

> "By establishing these positive obligations of the State, the members of the Constituent Assembly made it the responsibility of future Indian governments to

find a middle way between individual liberty and the public good, between preserving the property and the privilege of the few and bestowing benefits on the many in order to liberate the powers of all men equally for contributions to the common good."[17]

The 42nd and 44th Amendments.

In short, the Directives emphasise, in amplification of the Preamble, that the goal of the Indian polity is not *laissez faire*, but a welfare State, where the State has a positive duty to ensure to its citizens social and economic justice and dignity of the individual. It would serve as an 'Instrument of Instructions' upon all future governments, irrespective of their party creeds. The socialistic approach has been further emphasised by the *42nd* and *44th* Amendment Acts, as pointed out earlier.

(ii) Though these Directives are not enforceable by the Courts and if the Government of the day fails to carry out these objects no court can make the Government ensure them, yet these principles have been declared to be *fundamental* in the governance of the country, and a Government which rests on popular vote can hardly ignore them, while shaping its polity.[14]

(iii) Again, while at the time of the drafting of the Constitution, the Directives were considered by many as a surplusage because they were not justiciable, the working of the Constitution during the last few years has demonstrated the utility of the Directives even in the Courts. Thus,

(a) Though the Courts cannot declare a law to be *invalid* on the ground that it contravenes a Directive Principle, nevertheless the constitutional validity of many laws has been *maintained* with reference to the Directives so that they do not serve as mere '*moral homily*' as Prof. Wheare had anticipated in 1950. For instance, it has been held that when a law is challenged as constituting an invasion of the fundamental right specified in Art. 14 or 19,[10] the Court would uphold the validity of such law if it had been made to implement a Directive, holding that it constituted a 'reasonable classification' for the purpose of Art. 14;[18] a 'reasonable restriction' under Art. 19[19] [or a 'public purpose' within the meaning of *Art.* 31(2)].[10, 20]

The Constitution has since been amended to dispense with the need for judicial interpretation to reach the above conclusion. In 1971, Art. 31C was inserted in the Constitution to provide that a law to implement Art. 39(b)-(c) would be immune from the limitation imposed by Art. 14, 19 or 31. In 1976, this protection was extended to any law to give effect to *any* of the Directives included in Part IV, by the *42nd Amendment* Act. The Supreme Court has, however, resisted that extension.[11]

(b) Even as regards fundamental rights other than those under Arts. 14, 19 [and 31],[10] though the Directives cannot directly override them, in determining the scope and ambit of the fundamental rights themselves, the Court may not entirely ignore the Directive Principles and should adopt the principle of harmonious construction so as to give effect to both as much as possible.[21] Again, the Supreme Court has relied upon Art. 39A in determining the duty of the State in making a law under Art. 21 depriving a person of his personal liberty, and held that where a prisoner has a right of appeal, the State should provide him a free copy of the judgment and also engage a counsel for him at the cost of the State.[22-23]

(c) Not only in the matter of determining the constitutional validity of a legislation, but also in its *interpretation of statutes,* the Court should bear in mind the Directive Principles are not in conflict with but complementary to the Fundamental Rights, and enable the State to impose certain *duties* upon the citizens, insofar as the Directives are implemented, *e.g.*, in making a law to ensure minimum wages to workers, in accordance with the Directive in Art. 43.[24]

(d) Though the Directive Principles, as such, are not enforceable by the courts, of late the Supreme Court is issuing directives in proper cases, enjoining the Government to perform their positive duties to achieve the goals envisaged by the Directives.[25]

(iv) On the other hand, the Constitution itself has been amended, successively (*e.g.*, First, Fourth, Seventeenth, Twenty-fifth, Forty-second and Forty-fourth Amendments), to modify those 'fundamental rights' by reason of whose existence the State was experiencing difficulty in effecting agrarian, economic and social reforms which are envisaged by the Directive Principles.[26]

Implementation of the Directives.

It would not be an easy task to survey the progress made by the Governments of the Union and the States in implementing such a large number of Directives over a period of almost six decades since the promulgation of the Constitution. Nevertheless, a brief reference to some of the outstanding achievements may be made in order to illustrate that the Directives have not been taken by the Government in power as pious homilies, as was supposed by many when they were engrafted in the Constitution.

(a) The greatest progress in carrying out the Directives has taken place as regards the Directive [*Art.* 39(b)] that the State should secure that the ownership and control of the material resources of the community are so distributed as best to subserve the common good. The distribution of largesse of the State is for the common good and to subserve the common good of as many persons as possible.[27] In an agrarian country like India, the main item of material resources is no doubt agricultural. Since the time of the Permanent Settlement this important source of wealth was being largely appropriated by a group of hereditary proprietors and other intermediaries known variously in different parts of the country, such as, *zamindars, jagirdars, inamdars*, etc., while the actual tillers of the soil were being impoverished by the operation of various economic forces, apart from high rents and exploitation by the intermediaries. The Planning Commission, in its First Plan, therefore, recommended an abolition of these intermediaries so as to bring the tillers of the soil in direct relationship with the State. This reform has, by this time, been carried out almost completely throughout India. Side by side with this, legislation has been undertaken in many of the States for the improvement of the condition of the cultivators as regards security of tenure, fair rents and the like. In order to prevent a concentration of land holdings even among the actual cultivators, legislation has been enacted in many of the States, fixing a ceiling, that is to say, a maximum area of land which may be held by an individual owner.

It has already been stated how these reforms have been facilitated by amending the Constitution[28] to shield these laws from challenge in the Courts.

(b) A large number of laws have been enacted to implement the directive in Art. 40 to organise village panchayats and endow them with powers of self-government. It is stated that there are 2,27,698 Gram Panchayats, 5906 Intermediate Tiers and 474 Zila Panchayats in the country.[29] Though the constitution and functions of the panchayats vary according to the terms of the different State Acts, generally speaking, the panchayats, elected by the entire adult population in the villages, have been endowed with powers of civic administration such as medical relief, maintenance of village roads, streets, tanks and wells, provision of primary education, sanitation and the like.

Besides civic functions, the panchayats also exercise judicial powers. Legal practitioners are excluded from these village tribunals. Though owing to lack of proper education, narrow-mindedness and sectional interests in the rural areas, the system of panchayat administration is still under controversy. After the constitution 73rd and 74th Amendment Acts almost all the States have enacted laws vesting various degrees of powers of self-government in the hands of panchayats.

(c) For the promotion of cottage industries [Art. 43], which is a State subject, the Central Government has established several Boards[30] to help the State Governments, in the matter of finance, marketing and the like. These are—All-India Khadi and Village Industries Board; All-India Handicrafts Board; All-India Handloom Board; Small-scale Industries Board; Silk Board; Coir Board. Besides, the National Small Industries Corporation has been set with certain statutory functions, and the Khadi and Village Industries Commission has been set up for the development of the Khadi and village industries.

(d) Legislation for compulsory primary education [*Art.* 45] has been enacted in most of the States and in three Union Territories.[31]

(e) For raising the standard of living [*Art.* 47], particularly of the rural population, the Government of India launched its Community Development Project in 1952. Later on Integrated Rural Development Programme (IRDP) (1978-79), National Rural Employment Programme (NREP), Rural Landless Employment Guarantee Programme (RLEGP), Drought Prone Areas Programme (DPAP), Desert Development Programme (DDP) and some other schemes were launched.

Healthcare is one of the seven thrust areas under the National Common Minimum Programme (NCMP) and improvement in health continues to be an important part in overall strategy for socio-economic development over the planning period. The National Rural Health Mission (NRHM) is the key plank for giving effect to the mandate of the NCMP. The NRHM also provides an overarching umbrella to the existing programmes of Health & Family Welfare including RCH II, Vector Borne Disease Control Programme, T.B., Leprosy, NPC B and the Integrated Disease

Surveillance Project. It also addresses the issue of health in the context of a sector wide approach encompassing sanitation and hygiene, nutrition and safe drinking water as basic determinants of good health and also advocates greater convergence with related social sector Departments. The core strategies of the Mission include identification and selection of the Accredited Social Health Activist (ASHA), decentralized planning, strengthening of existing infrastructure like sub-centers, PHCs and CHCs, adoption of a sector wide approach, flexible financing, community participation, manpower development and partnership with non-government stakeholders. Maternal and childhealth will be given basic thrust on the programme front. The Pradhan Mantri Swasthya Suraksha Yojna is a major initiative for developing tertiary healthcare in the country, particularly to enable the availability of such facilities on a regional basic. It is also expected to reduce imbalance in human resources development by providing health care services through establishment of medical colleges and an improved delivery of services. Under PMSSY, 6 AIIMS like institutions are to be set up and 13 medical college upgraded. To tackle the menace of other communicable and non-communicable diseases, the Ministry of Health and Family Welfare continues to implement National Health Programmes throughout the country for Blindness, AIDS, Cancer, Mental Disorders *etc.*[32]

(f) Though legislation relating to prohibition of intoxicating drinks and drugs [*Art.* 47] had taken place in some of the Provinces long before the Constitution came into being, not much of effective work had been done until, in pursuance of the Directive in the Constitution, the Planning Commission took up the matter and drew up a comprehensive scheme through its Prohibition Enquiry Committee. Since then prohibition has been introduced in several States in whole or in part.[33]

Though paucity of the financial resources of the States is the primary reason for the failure to fully implement this Directive so far, it would be only candid to record that ultimately, failure of the people to imbibe the Gandhian ideal of life is at the back of this failure. The spread of the malady of intoxication amongst the younger generation since independence is, in fact, alarming. It should be pointed out that a fresh impetus was given to the programme of prohibition by the Janata Prime Minister, Mr. Desai, a staunch advocate of the Gandhian philosophy in this matter.

(g) As to the separation of the executive from the judiciary [*Art.* 50], the slow progress and diverse methods in the various States has been replaced by a uniform system by Union legislation, in the shape of the Criminal Procedure Code, 1973, which has placed the function of judicial trial in the hands of the 'Judicial Magistrates', who are members of the judiciary and are under the complete control of the High Court.[34]

Besides the Directives contained in Part IV, there are certain other Directives addressed to the State in other Parts of the Constitution. Those Directives are also non-justiciable. These are—

Directives contained in other Parts of the Constitution.

(a) Art. 350A enjoins every State and every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups.

(b) Art. 351 enjoins the Union to promote the spread of the Hindi language and to develop it so that it may serve as a medium of expression of all the elements of the composite culture of India.

(c) Art. 335 enjoins that the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.[35]

Though the Directives contained Arts. 335, 350A, 351 are not included in Part IV, Courts have given similar attention to them on the application of the principle that all parts of the Constitution should be read together.[36]

REFERENCES

1. 'State', in this context, has the same meaning as in the Chapter on Fundamental Rights (see under 'Fundamental Rights—a guarantee against State action', ante). This means that not only the Union and State authorities, but also local authorities shall have a moral obligation to follow the Directives, *e.g.*, the promotion of cottage industries, prohibition of consumption of intoxicants or of the slaughter of cows, calves and other milch cattle, improvement of public health and of the level of nutrition of the people.
2. JENNINGS, *Some Characteristics of the Indian Constitution,* p. 13.
3. A radicalist member of the Supreme Court has already expressed the view that the power to nationalise is implicit in Art. 39(b), if that is necessary to ensure a better 'distribution' of the ownership of material resources to subserve the common good [*State of Karnataka* v. *Ranganathan,* AIR 1978 S.C. 215 (paras 82-83).
4. *Hindustan Standard,* Delhi, 17-5-1958, p. 7; see also Second Five Year Plan, p. 22.
5. See, further, Author's *Constitutional Law of India* (Prentice-Hall of India, 1991), pp. 2-3.
6. The Central Government notified the Legal Services Authority Act, 1987 to bring into force a piece of legislation that would provide free legal aid to the poor and arming the *Lok Adalat* with the status of a Civil Court.
7. Mere insertion of the word 'socialist' in the Preamble does not introduce Socialism in the collectivist sense, for, according to the canons of interpretation, a Preamble merely serves as a key to the enacting provisions but cannot add to or modify *the law* as laid down in the enacting provisions of the Constitution.

   The Supreme Court has, however, observed that the insertion of the word 'socialist' in the Preamble would enable the *Courts* "to lean more and more in favour of nationalisation and State ownership of industry" [*Excel Wear* v. *Union of India,* A.I.R. 1979 S.C. 25 (para 24)]. This means that in upholding laws of nationalisation, the Court would liberally interpret the Directives in the light of omission of Arts. 19(1)(f) and 31(2), by the Constitution (42nd Amendment) Act, 1976.
8. *Dalmia Cement (Bharat) Ltd.* v. *Union of India,*(1996) 10 S.C.C. 104 (para 21).
9. *State of Madras* v. *Champakam,* (1951) S.C.R. 523 (*531*).
10. Art. 31 having been repealed, reference thereto has been omitted from Art. 31C, by the 44th Amendment Act, 1978.
11. *Minerva Mills* v. *Union of India,* AIR 1980 S.C. 1789. The latest view of the Supreme Court is that Part IV and Part III of the Constitution are complementary to each other, one being read in the colour of the other.
12. Ref. on the Kerala Education Bill, 1957, AIR 1958 S.C. 956.
13. *Jilubhai Nanbhai Khachar* v. *State of Gujarat,* 1995 Supp. (1) S.C.C. 596 (para 47) : A.I.R. 1995 S.C. 142.
14. VII C.A.D. 41, 476 (Dr. AMBEDKAR).
15. JENNINGS, *Some Characteristics of the Indian Constitution* (1953), pp. 31-33.
16. WHEARE, *Modern Constitutions,* p. 47.
17. GRANVILLE AUSTIN, *The Indian Constitution,* pp. 50-52.
18. *Orient Weaving Mills* v. *Union of India,* AIR 1963 S.C. 98.

19. *State of Bombay* v. *Balsara,* AIR 1951 S.C. 318; *Hanif Quareshi* v. *State of Bihar,* AIR 1968 S.C. 731.
20. *State of Bihar* v. *Kameshwar,* AIR 1952 S.C. 252 (MAHAJAN AND AIYYAR JJ.).
21. Ref. on the Kerala Education Bill, AIR 1958 S.C. 956; *State of T.N.* v. *Abu,* AIR 1984 S.C. 326 (paras 10-11); *Bandhua* v. *Union of India,* AIR 1984 S.C. 802 (para 10).
22. *Hoskot* v. *State of Maharashtra,* AIR 1978 S.C. 1548 (para 24).
23. *Kishore* v. *State of H.P.,* (1991) 1 S.C.C. 286 (paras 12, 13).
24. *C.B. Boarding & Lodging* v. *State of Mysore,* AIR 1970 S.C. 2042 (para 13).
25. *Nakara* v. *Union of India,* AIR 1983 S.C. 130 (paras 33-34); *Sheela* v. *State of Maharashtra,* AIR 1983 S.C. 378 (paras 1, 3); *People's Union* v. *Union of India,* AIR 1982 S.C. 1473 (para 7); *Lingappa* v. *State of Maharashtra,* AIR 1985 S.C. 389 (paras 14, 16).
26. Inserting Arts. 31A-31C and the Ninth Schedule in the Constitution.
27. *Mahinder Kumar Gupta* v. *Union of India,* (1995) 1 S.C.C. 85 (para 5).
28. *India, 1990,* p. 452.
29. *India, 1990,* p. 574ff. [see now the Constitution (72nd Amendment) Act, 1992, Table IV, *post*].
30. *India, 1982,* p. 47.
31. *Ibid.*, pp. 94ff.
32. India 2008, p. 433.
33. *Ibid.*, p. 120.
34. *Vide* Author's *Code of Criminal Procedure* (Prentice-Hall of India, 1992), pp. 3, 28.
35. *Balaji* v. *State of Mysore,* AIR 1963 S.C. 649 (*664*); *Devadasan* v. *Union of India,* AIR 1964 S.C. 179 (*188*).
36. See, further, Author's *Constitutional Law of India* (1991), pp. 398; *Dalavi* v. *State of T.N.,* AIR 1976 S.C. 1559 (paras 4, 6).

CHAPTER 10

PROCEDURE FOR AMENDMENT

Nature of the amending process.

THE nature of the amending process envisaged by the makers of *our* Constitution can be best explained by referring to the observation of Pandit Nehru (quoted under 'Reconciliation of a written Constitution with Parliamentary Sovereignty', *ante*), that the Constitution should not be so rigid that it cannot be adapted to the changing needs of national development and strength.

There was also a *political* significance in adopting a 'facile procedure' for amendment, namely, that any popular demand for changing the political system should be capable of realisation, if it assumed a considerable volume. In the words of Dr. Ambedkar, explaining the proposals for amendment introduced by him in the Constituent Assembly.[1]

> "Those who are dissatisfied with the Constitution have only to obtain in two-thirds majority, and if they cannot obtain even a two-thirds majority in the Parliament elected on adult franchise in their favour, their dissatisfaction with the Constitution cannot be deemed to be shared by the general public."[1]

Elements of flexibility were therefore imported into a Federal Constitution which is inherently rigid in its nature. According to the traditional theory of federalism, either the process of amendment of the Constitution is entrusted to a body other than the ordinary Legislature or a special procedure is prescribed for such amendment in order to ensure that the federal compact may not be disturbed at the will of one of the parties of the federation, *viz.*, the federal legislature.

But, as has been explained at the outset, the framers of *our* Constitution were also inspired by the need for the sovereignty of the Parliament elected by universal suffrage to enable it to achieve a dynamic national progress. They, therefore, prescribed an easier mode for changing those provisions of the Constitution which did not primarily affect the federal system. This was done in two ways—

(a) By providing that the alteration of certain provisions of the Constitution were '*not to be deemed to be amendment of the Constitution*'. The result is that such provisions can be altered by the Union Parliament in the ordinary process of legislation, that is, by a simple majority.

Procedure for Amendment.

(b) Other provisions of the Constitution can be changed only by the process of 'amendment' which is prescribed in Art. 368. But a differentiation has been again made in the procedure for amendment, according to the nature of the provisions sought to be amended.

While in all cases of amendment of the Constitution, a Bill has to be passed by the Union Parliament by a special majority, in the case of certain provisions which affect the *federal structure,* a further step is required, *viz.,* a ratification by the Legislature of at least half of the States, before the Bill is presented to the President for his assent [*Art.* 368]. But even in these latter group of cases, the law which eventually effects the amendment is a law made by Parliament, which is the ordinary legislative organ of the Union. There is thus no separate *constituent* body provided for by *our* Constitution for the amending process. The procedure for amendment is—

I. An amendment of the Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority (*i.e.,* more than 50%) of the total membership of that House *and* by a majority of not less than two-thirds of the members of that House *present and voting,* it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill.

II. If, however, such amendment seeks to make any change in the following provisions, namely,—

(a) The manner of election of the President [*Arts.* 54, 55]; (b) Extent of the executive power of the Union and the States [*Arts.* 73, 162]; (c) The Supreme Court and the High Courts [*Art.* 241, Chap. IV of Part V, Chap. V of Part VI]; (d) Distribution of legislative power between the Union and the States [Chap. I of Part XI]; (e) Any of the Lists in the 7th Schedule; (f) Representation of the States in Parliament [*Arts.* 80-81, 4th Schedule]; (*g*) Provisions of Art. 368 itself,—

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent[2] [*Art.* 368(2)].

General features of the Amending Procedure.

It is clear from the above that the amending process prescribed by *our* Constitution has certain distinctive features as compared with the corresponding provisions in the leading Constitutions of the world. The procedure for amendment must be classed as 'rigid' insofar as it requires a special majority and, in some cases, a special procedure for amendment as compared with the procedure prescribed for ordinary legislation. But the procedure is not as complicated or difficult as in the *U.S.A.* or in any other rigid Constitution:

(a) Subject to the special procedure laid down in Art. 368, *our* Constitution vests constituent power upon the ordinary legislature of the Union, *i.e.,* the Parliament (of course, acting by a special majority), and there is no separate body for amending the Constitution, as exists in some other Constitutions (*e.g.,* a Constitutional Convention).

(b) The State Legislatures cannot initiate any Bill or proposal for amendment of the Constitution. The only mode of initiating a proposal for amendment is to introduce a Bill in either House of the Union Parliament.

(c) *Subject to the provisions of Art. 368,* Constitution Amendment Bills are to be passed by the Parliament in the same way as ordinary Bills.[3] In other words, they may be initiated in *either* House, and may be amended like other Bills, subject to the majority required by Art. 368. But for the special majority prescribed, they must be passed by both the Houses, like any other Bill.

No Joint-Session for Constitution Amending Bills.

It would be pointed out, in this context, that there is another important point on which the passage of a Constitution Amendment Bill differs from the procedure relating to the passage of a Bill for ordinary legislation: Art. 108 provides that if there is a disagreement between the two Houses of Parliament regarding the passage of a Bill, the deadlock may be solved by a *joint session* of the two Houses. But it is clear from Art. 108(1), that the procedure for joint session is applicable only to Bills for ordinary legislation which come under Chap. 2 of Part V of the Constitution, and *not* to Bills for amendment of the Constitution, which are governed by the self-contained procedure contained in Art. 368(2). The requirement of a special majority in both Houses, in Art. 368(2) would have been nugatory had the provision as to joint session been available in this sphere.

(d) The previous sanction of the President is not required for introducing in Parliament any Bill for amendment of the Constitution.

(e) The requirement relating to ratification by the State Legislatures is more liberal than the corresponding provisions in the American Constitution. While the latter requires ratification by not less than three-fourths of the States, under *our* Constitution ratification by not less than half of them suffices.

(f) In the case of an ordinary Bill, governed by Art. 111, when the Bill, after being passed by both Houses of Parliament, is presented to the President, he may, instead of assenting to it, declare that he 'withholds assent therefrom'. In the latter case, the Bill cannot become an 'Act'. But the amendment of Art. 368 in 1971 has made it *obligatory* for the President to give his assent to a Bill for amendment of the Constitution, when it is presented to him after its passage by the Legislature.

President bound to give assent.

In short, though the formality of the President's assent has been retained in the case of an amendment of the Constitution, in order to signify the date when the amendment Bill becomes operative as a part of the Constitution, the President's power to veto a Bill for amendment of the Constitution has been taken away, by substituting the words '*shall* give his assent' in Cl. (2) of the Art. 368, as it stands after the Constitution (24th Amendment) Act, 1971.

There has been a historical controversy whether an amendment of the Constitution, made in the manner provided for under Art. 368, must have to conform to the requirements of Art. 13(2), as a 'law' as defined in Cl. (3) of Art. 13; or, in other words, whether a Constitution Amendment Act would be void if it seeks to take away or is inconsistent with a fundamental right enumerated in Part III of the Constitution.

Is Part III or any other Part of the Constitution unamendable?

A. Until the case of *Golak Nath,*[4] the Supreme Court had been holding that no part of our Constitution was unamendable and that Parliament might, by passing a Constitution Amendment Act, in compliance with the requirements of Art. 368, amend any provision of the Constitution, including the Fundamental Rights and Art. 368 itself.[3] It was held[3] that 'law' in Art. 13 (2) referred to ordinary legislation made by Parliament as a *legislative* body and would not include an amendment of the Constitution which was passed by the Parliament in its *constituent* capacity.

B. But, in *Golak Nath's* case,[4] a majority of six Judges in a special Bench of eleven overruled the previous decisions[3] and took the view that though there is no express exception from the ambit of Art. 368, the Fundamental Rights included in Part III of the Constitution cannot, by their very nature, be subject to the process of amendment provided for in Art. 368 and that if any of such Rights is to be amended, a new Constituent Assembly must be convened for making a new Constitution or radically changing it.

Golak Nath.

The majority, in *Golak Nath's* case,[4] rested its conclusion on the view that the power to amend the Constitution was also a legislative power conferred by Art. 245 by the Constitution, so that a Constitution Amendment Act was also a 'law' within the purview of Art. 13(2).

Keshavananda.

C. After the *Golak Nath*[4] decision, Parliament sought to supersede it by amending Art. 368 itself, by the Constitution (24th Amendment) Act, 1971, as a result of which an amendment of the Constitution passed in accordance with Art. 368, will not be 'law' within the meaning of Art. 13 and the validity of a Constitution Amendment Act shall not be open to question on the ground that it takes away or affects a fundamental right [*Art.* 368(3)]. Even after this specific amendment of the Constitution, the controversy before the Supreme Court did not cease because the validity of the 24th Constitution Amendment Act itself was challenged in a case from Kerala (*Keshavananda* v. *State of Kerala*[5]), which was heard by a Full Bench of 13 Judges. The majority of the Full Court upheld the validity of the 24th Amendment and overruled the case of *Golak Nath.*[4]

The question has thus been *settled* in favour of the view that a Constitution Amendment Act, passed by Parliament, is not 'law' within the meaning of Art. 13. The majority, in *Keshavananda's* case,[5] upheld the validity of Cl. (4) of Art. 13 [and a corresponding provision in Art. 368(3)], which had been inserted by the Constitution (24th Amendment) Act, 1971, and reads as follows:

> "*Nothing in this article* (i.e., Art. 13), *shall apply to any amendment made under article 368.*"

Fundamental Rights amendable.

In the result, fundamental rights in India can be amended by an Act passed under Art. 368, and the validity of a Constitution Amending Act cannot be questioned on the ground that that Act invades or encroaches upon any Fundamental Right.

D. Another question which has been mooted since the case of *Golak Nath*[4] is, whether, outside Part III (Fundamental Rights), there is any other provision of the Constitution of India which is immune from the process of amendment in Art. 368. Though the majority in *Keshavananda's* case[5] has overturned the majority view in *Golak Nath*[4] that Fundamental Rights cannot be amended under Art. 368, it has affirmed another proposition asserted by the majority in *Golak Nath's* case,[4] namely, that—

'Basic Features' of the Constitution not amendable.

(i) There are certain *basic features* of the Constitution of India, which cannot be altered in exercise of the power to amend it, under Art. 368. If, therefore, a Constitution Amendment Act seeks to alter the basic structure or framework of the Constitution, the Court would be entitled to annul it on the ground of *ultra vires,* because the word 'amend', in Art. 368, means only changes other than altering the very structure of the Constitution, which would be tantamount to making a new Constitution.[6]

(ii) These basic features, without being exhaustive, are—sovereignty and territorial integrity of India, the federal system, judicial review, Parliamentary system of government.

(iii) Applying this doctrine that judicial review is a basic feature of the Constitution of India, the majority in *Keshavananda*[5] held the second part of s. 3 of the Constitution (25th Amendment) Act, 1971, relating to Art. 31C, as invalid. The portion so invalidated read—

> "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any Court on the ground that it does not give effect to such policy".

Article 31C, which was introduced by s. 3 of the 25th Amendment Act, provided—(a) that if any law seeks to implement the Directive Principle contained in Art. 39(b)-(c) *i.e.,* regarding socialistic control and distribution of the material resources of the country, such law shall not be void on the ground of contravention of Art. 14 or 19; (b) it further provided that if anybody challenges the constitutionality of any such law, the Court would be precluded from entering even into the preliminary question, namely, whether such law is, in fact, a law, 'giving effect to' Art. 39(b) or (c), if on the face of the Act, there was a declaration of the Legislature that it is for giving effect to such Directive policy. In other words, by adding a declaration to an Act, the Legislature was empowered by the 25th Constitution Amendment Act, to deprive the Courts of their power to determine the validity of the Act on the ground that it contravened some provision of the Constitution. The majority held that Art. 368 did not confer any such power to take away judicial review, in the name of 'amending' the Constitution.[5]

The foregoing view of the majority in *Keshavananda's* case[5] as to 'basic features' is debatable inasmuch as there is no express limitation upon the amending power conferred by Art. 368(1). If it is supposed that there are some implied limitations, it is difficult to appreciate how the Court, after holding that the Fundamental Rights did *not* constitute such inviolable part of the Constitution, could come to the conclusion that judicial review, which is an adjunct of Fundamental Rights, could be so considered. It would, therefore, be no wonder if another Full Bench of the Supreme Court comes to overturn this view in *Keshavananda's* case,[5] on the grounds—

> (i) that Art. 368(1), as it stands amended in 1971, makes it clear that not only the procedure, but also the 'power' to amend the Constitution is conferred by Art. 368 itself and cannot be derived from somewhere else, such as Art. 245. Hence, the limitations, if any, upon the amending power must be found from Art. 368 itself and not from any theory of implied limitation;
>
> (ii) that the word 'repeal' in Art. 368(1) also makes it clear that 'amendment', under Art. 368, includes a repeal of any of its provisions, including any supposed 'basic' or 'essential' provision;
>
> (iii) that the Constitution of India makes no distinction between 'amendment' and 'total revision', as do some other Constitutions, such as the Swiss. Hence, there is no bar to change the whole Constitution, in exercise of the amending power, which is described as the '*constituent power*' [*Art.* 368(1)] and that, accordingly, it would not be necessary to convene a Constituent Assembly to revise the Constitution in toto.

The 42nd Amendment.

The Indira Government sought to arrest these implications of *Keshavananda,*[5] and cut the fetters sought to be imposed on the sovereignty of Parliament (as a constituent body), by inserting two Cls. (4)-(5) in Art. 368, by the 42nd Amendment Act, 1976.[6] Clause (5) declares that "there shall be no limitation" "on the constituent power of Parliament to amend" the provisions of this Constitution and that at any rate, the validity of no Constitution Amendment Act "shall be called in question in any court on *any* ground" [Cl. (4)].

The foregoing attempt to preclude judicial review of Constitution Amending Acts has, however, been nullified by the Supreme Court, by striking down Cls. (4)-(5) as inserted in Art. 368 by the 42nd Amendment Act, by its decision in the *Minerva Mills* case,[7] on the ground that judicial review is a 'basic feature' of the Indian Constitutional system which cannot be taken away even by amending the Constitution.

So far, the decision in *Keshavananda*[5] has been followed in subsequent cases by the Supreme Court. As a result, Art. 368, as so interpreted by the highest Court, would lead to the following propositions:

(i) Any part of the Constitution may be amended after complying with the procedure laid down in Art. 368.

Art. 368 as interpreted by the Supreme Court.

(ii) No referendum or reference to Constituent Assembly would be required to amend any provision of the Constitution.

(iii) But no provision of the constitution or any part thereof can be amended if it takes away or destroys any of the 'basic features' of the Constitution. Thus, apart from the procedural limitation expressly laid down in Art. 368, substantive limitation founded on the doctrine of 'basic features', has been introduced into *our* Constitution, by judicial innovation.

List of basic features.

The Supreme Court has refused to foreclose its list of 'basic features'. From the various decisions so far, the following list may be drawn up[8]:

(a) Supremacy of the Constitution.

(b) Rule of law.

(c) The principle of Separation of Powers.

(d) The objectives specified in the Preamble to the Constitution.

(e) Judicial review; Arts. 32 and 226/227.

(f) Federalism.

(*g*) Secularism.

(*h*) The sovereign, democratic, republican structure.

(i) Freedom and dignity of the individual.

(j) Unity and integrity of the Nation.

(k) The principle of equality, not every feature of equality, but the quintessence of equal justice.

(l) The 'essence' of other Fundamental Rights in Part III.

(m) The concept of social and economic justice—to build a welfare State; Part IV in toto.

(n) The balance between Fundamental Rights and Directive Principles.

(o) The Parliamentary system of government.

(p) The principle of free and fair elections.

(q) Limitations upon the amending power conferred by Art. 368.

(r) Independence of the Judiciary but within the four corners of the Constitution and not beyond that.

(s) Effective access to justice.

(t) Powers of the Supreme Court under Arts. 32, 136, 141, 142.

(u) Legislation seeking to nullify the awards made in exercise of the judicial power of the State by Arbitration Tribunals constituted under an Act.[9]

(v) Reasonableness.[10]

(w) Social justice.[11]

(x) Art. 21 r/w Arts. 14 and 19; Arts. 15 and 14 r/w Arts. 16(4), (4-A) &(4-B); Arts. 20 and 32, *etc.* including the principles or essence underlying them.[12]

(y) The balance provided for between the Part III (Fundamental Right) and the Part IV (Directive Principles).[13]

A History of Amendments of the Constitution since 1950.

Since its commencement on January 26, 1950, Constitution of India has been amended *94 times till June 2006* by passing Acts of Parliament in the manner prescribed by Art. 368 [see Table IV, *post*].[14] Since all these Amendment Acts have been mentioned, with full particulars, in Table IV, *post,* it is needless to reproduce them in the present Chapter.

The 42nd Amendment.

Nevertheless, the 42nd, 43rd and the 44th Amendments must be given a fuller treatment in view of its serious repercussions in the political as well as the legal world. All previous amendments paled into insignificance after the passing of the 42nd Amendment Act, 1976, which alone would illustrate how momentous is the amending power under the Indian Constitution, and how easy it is to change extensive and vital provisions of the Constitution, without any elaborate formalities, *when the ruling Party has a comfortable majority in the two Houses of Parliament.*[10]

The 42nd Amendment Act was practically a 'revision' of the Constitution, for the following reasons:

(i) In extent, it introduced changes in the Preamble, as many as 53 Articles, as well as the 7th Schedule.

(ii) As to substantive changes, it sought to change the vital principles underlying the 1949- Constitution:[15]

I. *Judicial Review of ordinary laws.* It made, for the first time, a distinction between Union and State laws, for the purpose of challenging their constitutionality on the ground of contravention of any provision of the Constitution and provided, broadly, (a) that a High Court could not pronounce invalid any Central law, including subordinate legislation under such law, on the ground of unconstitutionality; (b) that the Supreme Court could not, in its jurisdiction under Art. 32, pronounce a State law as unconstitutional, unless a Central law had also been challenged in such proceeding. If any law was made to implement any of the directives included in Part IV [*Art.* 31C] or in exercise of the new power under Art. 31D to ban antinational activities or associations the validity of such law could not be challenged on the ground of contravention of Arts. 14, 19, 31. Above all, an artificial majority of Judges was required both in the Supreme Court and the High Courts, in order to pronounce a law to be unconstitutional and invalid.

II. *Judicial Review of Constitution Amendment Acts.* By amending Art. 368, it was provided that a law, which is described as a Constitution Amendment Act, would be completely immune from challenge in a Court of law, whether on a procedural or substantive ground. Thus, even if such a Bill had not been passed in conformity with the *procedure* laid down in Art. 368 itself, nobody would be entitled to challenge it in any Court on that ground,—a position which is juristically absurd.

III. *Fundamental Duties.* For the first time, a Chapter on Fundamental *Duties* [*Art.* 51A] was introduced in order to counteract the sweep of Fundamental Rights. Even though no sanction has been appended to these Duties, it is obvious that if a Court takes these Duties into consideration along with fundamental rights, the scope of the free play of the rights would, to that extent, be narrowed down.

IV. *Fundamental Rights devalued.* By expanding the scope of Art. 31C, it was provided that if any law seeks to implement *any* of the Directive Principles included in Part IV, such law would be altogether immune from judicial review on the ground of contravention of Fundamental Rights. This is exactly the reverse of what was provided in the 1949-Constitution. The load on Fundamental Rights, in short, became ruthlessly heavy after the cumulative burden of Arts. 31A, 31B, 31C, 31D, 51A.

The 43rd and 44th Amendments.

When the Janata Party came to power towards the end of March, 1977, they sought to take early steps to fulfil their election pledge to undo the extensive mischief which had been done to the Constitution by the 42nd Amendment

Act, as outlined above. But owing to the fact that the Janata had no majority,—not to speak of a 2/3 majority,—in the *Rajya Sabha,* which was required to pass a Constitution Amending Bill under Art. 368,[10] their attempts in this behalf were chequered and only partially successful. The first step was abortive, namely, that the 43rd Amendment Bill which was introduced in the *Lok Sabha* in April, 1977, had to be left over till the next Session, hoping to gain some more seats in the *Rajya Sabha* at the periodical election to be held to that House in the meantime. Eventually, the 43rd Amendment Act, 1977 was passed with the aid of the votes of Congress(O).[10] The attitude of that Party, however, changed, when the next Bill (*viz.,* the 45th) was taken to the *Rajya Sabha* in 1978,[10] as a result of which this Bill was enacted, only *in a truncated shape,* as the 44th Amendment Act, 1978.

The changes made by the 43rd and the 44th Amendment Acts are summarised in Table IV, *post.* Briefly speaking,—

(i) The 43rd Amendment Act, 1977, simply repealed those provisions which had been added by the 42nd Amendment Act to curb judicial review, *e.g.,* Arts. 31D, 32A, 144A, 226A, 228A.

(ii) The changes made by the 44th Amendment Act are more extensive:

(a) It not only omitted some more of the Articles which had been inserted by the 42nd, *e.g.,* Arts. 257A, 329A; but also made amendments in other Articles in order to restore those provisions to their ante-1976 text, *e.g.,* Art. 226.

(b) Apart from combating the mischiefs introduced by the 42nd Amendment, the 44th Amendment Act introduced additional changes, *e.g.,* by omitting the fundamental right to property in Art. 19(1)(f) and Art. 31(2).

(c) Since Janata failed to secure the passage of a number of clauses of the 45th Amending Bill, the stamp of the 42nd Amendment on various provisions, such as Art. 368, still remains. Besides, the Janata Government have themselves retained some of the provisions as amended by the 42nd Amendment, which they considered to beneficial, *e.g.,* Art. 74(1); Art. 311.

The 73rd and 74th Amendments.

Of the subsequent amendments, the 73rd and 74th Amendment Act of 1992 deserve special mention inasmuch as it has introduced the electoral system for the composition of the units of local government below the States, *viz.,* the Panchayats in the rural areas, and the Municipalities in the urban areas.

Dangers of frequent Amendments.

It is evident that, instead of being rigid,[10] as some critics supposed during the early days of the Constitution,[16] the procedure for amendment has rather proved to be too flexible in view of the ease with which as many as 94 amendments have been made during the first 59 years of the working of the Constitution. So long as the Party in power at the Centre has a solid majority in Parliament and in more than half of the State Legislatures, the apprehension of impartial observers should be not as to the difficulty of amendment but as to the possibility of its being used too often either to achieve political purposes or to get rid of judicial decisions which may appear to be unwholesome to the party in power. Judges may, of course, err but, as has already been demonstrated, even the highest tribunal is likely to change its views in the light of further experience.[18] In the absence of serious repercussions or emergent circumstances or a special contingency (*e.g.*, to admit Sikkim—by the 35th and 36th Amendments), therefore, the process of constitutional amendment should not be resorted to for the purpose of overriding unwelcome judicial verdicts so often as would generate in the minds of the lay public an irreverence for the Judiciary,—thus shaking the very foundation of constitutional government.

REFERENCES

1. C.A.D., dated 25-11-1949, pp. 225-26.
2. See Table IV for instances where such ratification has been obtained for amending the Constitution.
3. *Shankari Prasad* v. *Union of India,* AIR 1951 S.C. 458; *Sajjan* v. *State of Rajasthan,* AIR 1965 S.C. 845.
4. *Golak Nath* v. *State of Punjab,* AIR 1967 S.C. 1643.
5. *Keshavananda* v. *State of Kerala,* AIR 1973 S.C. 1461 (F.B.).
6. See Author's *Constitutional Law of India* (Prentice-Hall of India, 1991), pp. 425-26. [The observations to the contrary in *Sanjeev Coke Co.* v. *Bharat Coal Ltd.,* AIR 1983 S.C. 239 (para. 13) do not suffice to overturn either *Keshavananda* or *Minerva Mills.*]
7. *Minerva Mills* v. *Union of India,* AIR 1980 S.C. 1789. Clauses (4) and (5), inserted into Art. 368 by the Constitution (42nd Amendment) Act, 1976, have been declared invalid by the Supreme Court Constitution Bench, on the ground that these clauses which removed all limitations upon the power of Parliament to amend the Constitution and precluded judicial review of a Constitution Amendment Act, on *any* ground, sought to destroy an 'essential feature' or 'basic structure' of the Constitution.
8. See Author's *Shorter Constitution of India,* 14th Ed., 2008, under Art. 368.
9. *G.C. Kanungo* v. *State of Orissa,* (1995) 5 S.C.C. 96 (para 28) : A.I.R. 1995 S.C. 1655.
10. *M. Nagaraj* v. *Union of India,* (2006) 8 SCC 212.
11. *M. Nagaraj* v. *Union of India,* (2006) 8 SCC 212.
12. *I.R. Coelho* v. *State of T.N.,* AIR 2007 SC 861.
13. *I.R. Coelho* v. *State of T.N.,* AIR 2007 SC 861.
14. The question of rigidity or flexibility of the procedure for amendment prescribed by Art. 368 was so long clouded by the fact that the Congress Party had a monolithic control over the Legislatures both at the Union and in the States. It was this extraordinary fact that enabled them to overcome the *double* majority safeguard in Art. 368(2), and to bring 83 amendments in 50 years. The rigidity of the double majority requirement has, on the other hand, been demonstrated by the difficulties which the Janata Government (1977-78) had to face to obtain the passage of an amendment bill to do away with the undemocratic features of the 42nd Amendment, on which they had the support of the consensus of enlightened public opinion. It is to be noted that—

    (a) Art. 368(2) requires that a Constitution Amendment Bill must be passed by the double majority in *each* House of Parliament, so that if the Janata Government failed to obtain that majority in the *Rajya Sabha,* it could not resort to a 'joint sitting' of both Houses, as prescribed by Art. 108 in the case of *ordinary* legislation.

    (b) The requirement of double majority may be illustrated with the strength of the Janata Party in the *Rajya Sabha* in September, 1977. The Rajya Sabha having a total membership of 250 members (roughly),—under the first part of Art. 368(2), a Constitution Amendment Bill could be passed only if at least 126 members voted for it. But since the Janata Party had a following of 41 only (roughly) in the *Rajya Sabha,* they could not rely on their own strength, in obtaining a passage of such Bill.

    The second part of Art. 368(2) is no less, perhaps more, rigorous. It requires that 2/3 of the members who are present on the date of voting on the Constitution Amendment Bill and actually tender their vote, must vote in favour of the Bill. If so, the Bill could be passed only if 168 members voted in its favour; and that was too much for the Janata Party commanding only 41 members of their own.

That is why the fate of the amendment Bill proposed by the Janata depended on the pleasure of the Congress Party. In order to avoid opposition from the Congress (O), the Janata Government, therefore, divided their proposals into two Bills. In the first instance, the less controversial proposals were included in the Bill which was passed in 1977 as the 43rd Amendment Act. The next Bill (45th Bill, which became the 44th Amendment Act, 1978), met with stiffer resistance because Congress(O) now joined hands with Congress(I) to sabotage the more vital parts of this latter Bill,—thus defeating, for instance, the Clause which sought to amend Art. 368 itself,—to introduce referendum.

The same difficulty faced Mrs. Gandhi after her return to power in January, 1980. She failed to make any substantial amendment to the Constitution before 1984 as she could not command the required majority in the Rajya Sabha [*Statesman,* 4-11-1982, p. 1].

The Congress(I) Governments' two Bills (64th and 65th Amendment Bills, 1989) to amend the Constitution to insert provisions regarding Nagarpalika and Panchayats fell through in the Rajya Sabha on 13-10-1989, being just two votes short of the required majority. The Lok Sabha had passed them on 10-8-1989.

The Constitution (64th Amendment) Bill, 1990, relating to amendment of Art. 356 in relation to Punjab, was passed by Rajya Sabha on 28-3-1990.

In Lok Sabha (30th March, 1990) on the motion for consideration of the Bill only 236 votes were in favour (5 against). The motion was declared as not carried for want of required majority (majority of the total membership of the House). A fresh Bill had to be brought for passing the amendment.

The procedure prescribed by Art. 368(2), *per se,* cannot therefore be described as flexible.

15. For a fuller treatment, see Author's *Constitutional Amendment Acts, with a Critical Survey of the 42nd Constitution Amendment Act, 1976* (pp. 99-134).
16. Cf. JENNINGS, *Some Characteristics of the Indian Constitution,* pp. 9-10.
17. Cf. RAMASWAMI AIYAR'S Foreword to KRISHNASWAMI AIYAR'S *Constitution and Fundamental Rights,* p. ix.
18. Thus, in *Bengal Immunity Co.* v. *State of Bihar,* (1955) 2 S.C.R. 603, the Supreme Court overruled its previous majority decision in *State of Bombay* v. *United Motors,* (1953) S.C.R. 1069, as regards the power of a State in which goods are delivered for consumption to tax the sale or purchase of such goods though it is in the course of inter-State trade or commerce. It was observed in this case that there was no provision in the Constitution to bind the Supreme Court by its own decisions.

PART II

Government of the Union

CHAPTER 11

THE UNION EXECUTIVE

1. The President and the Vice-President.

At the head of the Union Executive stands the President of India.

Election of President

The President of India is elected[1] by indirect election, that is, by an electoral college, in accordance with the system of proportional representation by means of the single transferable vote.[2]

The electoral college[3] shall consist of—

(a) The elected members of both Houses of Parliament; (b) the elected members of the Legislative Assemblies of the States; and (c) the elected members of the Legislative Assemblies of Union Territories of Delhi and Pondicherry [*Art.* 54].

As far as practicable, there shall be uniformity of representation of the different States at the election, according to the population and the total number of elected members of the Legislative Assembly of each State, and parity shall also be maintained between the States as a whole and the Union [*Art.* 55]. This second condition seeks to ensure that the votes of the States, in the aggregate, in the electoral college for the election of the President, shall be equal to that of the people of the country as a whole. In this way, the President shall be a representative of the nation as well as a representative of the people in the different States. It also gives recognition to the status of the States in the federal system.

The system of indirect election was criticised by some as falling short of the democratic ideal underlying universal franchise, but indirect election was supported by the framers of the Constitution, on the following grounds—

(i) Direct election by an electorate of some 510 millions of people would mean a tremendous loss of time, energy and money. (ii) Under the system of responsible Government introduced by the Constitution, real power would vest in the ministry; so, it would be anomalous to elect the President directly by the people without giving him real powers.[4]

In order to be qualified for election as President, a person must—

Qualifications for election as President

(a) be a citizen of India;

(b) have completed the age of thirty-five years;

(c) be qualified for election as a member of the House of the People; and

(d) must *not* hold any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Government [*Art.* 58].

But a sitting President or Vice-President of the Union or the Governor of any State or a Minister either for the Union or for any State is not disqualified for election as President [*Art.* 58].

Term of Office of President.

The President's term of office is five years from the date on which he enters upon his office; but he is eligible for re-election[5] [*Arts.* 56-57].

The President's office may terminate within the term of five years in either of two ways—

(i) By resignation in writing under his hand addressed to the Vice-President of India,

(ii) By removal for violation of the Constitution, by the process of impeachment [*Art.* 56]. The only ground for impeachment specified in Art. 61(1) is 'violation of the Constitution'.

Procedure for impeachment of the President.

An impeachment is a quasi-judicial procedure in Parliament. *Either House* may prefer the charge of violation of the Constitution before the other House which shall then either investigate the charge itself or cause the charge to be investigated.

But the charge cannot be preferred by a House unless—

(a) a resolution containing the proposal is moved after a 14 days' notice in writing signed by not less than 1/4 of the total number of members of that House; and

(b) the resolution is then passed by a majority of not less than 2/3 of the total membership of the House.

The President shall have a right to appear and to be represented at such investigation. If, as a result of the investigation, a resolution is passed by not less than 2/3 of the total membership of the House before which the charge has been preferred declaring that the charge has been sustained, such resolution shall have the effect of removing the President from his office with effect from the date on which such resolution is passed [*Art.* 61].

Since the Constitution provides the mode and ground for removing the President, he cannot be *removed* otherwise than by impeachment, in accordance with the terms of Arts. 56 and 61.

Conditions of President's Office.

The President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President. The president shall not hold any other office of profit [*Art.* 59(1)].

Emoluments and allowances of President.

The President shall be entitled without payment of rent to the use of his official residence and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law (and until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule of the Constitution).[6] By passing the President's Emoluments and Pension (Amendment) Act, 1998, Parliament has raised the emoluments to Rs. *50,000/-* per mensem. The emoluments and allowances of the President shall not be diminished during his term of office [*Art.* 59(3)].

The Amendment Act, 1998 referred to above also provides for the payment of an annual pension of Rs. 3,00,000 to a person who held office as President, on the expiration of his term or on resignation, provided he is not re-elected to the office.

Vacancy in the Office of President.

A vacancy in the office of the President may be caused in any of the following ways—

(i) On the expiry of his term of five years.

(ii) By his death.

(iii) By his resignation.

(iv) On his removal by impeachment.

(v) Otherwise, *e.g.,* on the setting aside of his election as President [*Art.* 65(1)].

(a) When the vacancy is going to be caused by the *expiration of the term* of the sitting President, an election to fill the vacancy must be *completed* before the expiration of the term [*Art.* 62(1)]. But in order to prevent an 'interregnum', owing to any possible delay in such completion, it is provided that the outgoing President must continue to hold office, notwithstanding that his term has expired, until his successor enters upon his office [*Art.* 56(1)(c)]. (There is no scope for the Vice-President getting a chance to act as President in this case.)

(b) In case of a vacancy arising by reason of any cause *other than* the expiry of the term of the incumbent in office, an election to fill the vacancy must be held as soon as possible after, and in no case later than, six months from the date of occurrence of the vacancy.

Immediately after such vacancy arises, say, by the death of the President, and until a new President is elected, as above, it is the Vice-President who shall act as President [*Art.* 65(1)]. It is needless to point out that the new President who is elected shall be entitled to the full term of five years from the date he enters upon his office.

(c) Apart from a permanent *vacancy,* the President may be temporarily *unable* to discharge his functions, owing to his absence from India, illness or any other cause, in which case the Vice-President shall *discharge his functions* until the date on which the President resumes his duties [*Art.* 65(2)].

Election of Vice-President

The election[1] of the Vice-President, like that of the President, shall be indirect and in accordance with the system of proportional representation by means of the single transferable vote. But his election shall be different from that of the President inasmuch as the State Legislatures shall have no part in it. The Vice-President shall be elected by an electoral college consisting of the members of both Houses Parliament[7] [*Art.* 66(1)].

Qualifications for election as Vice-President.

As in the case of the President, in order to be qualified to be elected as Vice-President, a person must be (a) a citizen of India; (b) has completed 35 years of age; and (c) must *not* hold an office of profit save that of President, Vice-President, Governor or Minister for the Union or State [*Art.* 66].

But while in order to be a President, a person must be qualified for election as a member of the House of the People, in order to be Vice-President, he must be qualified for election as a member of the Council of States. The reason for this difference is obvious, namely, that the Vice-President is normally to act as the Chairman of the Council of States.

Whether a Member of Legislature may become President or Vice-President.

There is no bar to a member of the Union or State Legislature being elected President or Vice-President, but the two offices cannot be combined in one person. In case a member of the Legislature is elected President or Vice-President, he shall be deemed to have vacated his seat in that House of the Legislature to which he belongs on the date on which he enters upon his office as President or Vice-President [*Arts.* 59(1); 66(2)].

Term of Office of Vice-President.

The term of office of the Vice-President is five years. His office may terminate earlier that the fixed term either by resignation or by removal. A formal impeachment is *not* required for his removal. He may be removed by a resolution of the Council of States passed by a majority of its members and agreed to by the House of People [*Art.* 67, Prov. (b)].

Though there is no specific provision (corresponding to Art. 57) making a Vice-President eligible for re-election, the *Explanation* to Art. 66 suggests that a sitting Vice-President is eligible for re-election and Dr. S. Radhakrishnan was, in fact, elected for a second term in 1957.

Functions of the Vice-President.

The Vice-President is the highest dignitary of India, coming next after the President [see Table IX]. No functions are, however, attached to the office of the Vice-President as such. The normal function of the Vice-President is to act as the *ex-officio* Chairman of the Council of States. But if there occurs any vacancy in the office of the President by reason of his death, resignation, removal or otherwise, the Vice-President shall *act* as *President* until a new President is elected and enters upon his office [*Art.* 65(1)].

The Vice-President shall *discharge the functions* of the President during the temporary absence of the President, illness *or any other cause* by reason of which he is unable to discharge his functions [*Art.* 65(2)]. No machinery having been prescribed by the Constitution to determine when the President is unable to discharge his duties owing to absence from India or a like cause, it becomes a somewhat delicate matter as to who should move in the matter on the any particular occasion. It is to be noted that this provision of the Constitution has not been put into use prior to 20th June, 1960, though President, Dr. Rajendra Prasad had been absent from India for a considerable period during his foreign tour in the year 1958. It was during the 15-day visit of Dr. Rajendra Prasad to the Soviet Union in June 1960, that for the first time, the Vice-President, Dr. Radhakrishnan was given the opportunity of acting as the President owing to the 'inability' of the President to discharge his duties.

The second occasion took place in May, 1961, when President Rajendra Prasad become seriously ill and incapable of discharging his functions. After a few days of crisis, the President himself suggested that the Vice-President should discharge the functions of the President until he resumed his duties. It appears that the power to determine when the President is unable to discharge his duties or when he should resume his duties has been understood to belong to the President himself. In the event of occurrence of vacancy in the office of both the President and the Vice-President by reason of death, resignation, removal etc. the Chief Justice of India or in his absence the seniormost Judge of the Supreme Court available shall discharge the functions until a new President is elected. In 1969 when on the death of Dr. Zakir Hussain, the Vice-President Shri V. V. Giri resigned, the Chief Justice Shri HIDYATULLAH discharged the functions from 20-7-1969.

Emoluments.

When the Vice-President acts as, or discharges the functions of the President, he gets the emolument of the President; otherwise; the gets the salary of the chairman of the Council of States.[8]

When the Vice-President thus acts as, or discharges the functions of the President he shall cease to perform the duties of the Chairman of the Council of States and then the Deputy Chairman of the Council of States shall acts as it Chairman [*Art.* 91].

Doubts and disputes relating to or connected with the election of a President or Vice-President.

Determination of doubts and disputes relating to the election of a President or Vice-President is dealt with in Art. 71, as follows—

(a) Such disputes shall be decided by the Supreme Court whose jurisdiction shall be *exclusive* and *final*.

(b) No such dispute can be raised on the ground of any vacancy in the electoral college which elected the President or Vice-President.

(c) If the election of a President or Vice-President is declared void by the Supreme Court, acts done by him prior to the date of such decision of the Supreme Court shall not be invalidated.

(d) Barring the decision of such disputes, other matters relating to the election of President or Vice-President may be regulated by law made by Parliament.

2. Powers and duties of the President.

Nature of the powers of the President.

The Constitution says that the "executive power of the Union shall be vested in the President" [*Art.* 53]. The President of India shall thus be the head of the 'executive power' of the Union.

The 'executive power' primarily means the execution of the laws enacted by the Legislature, but the business of the Executive in a modern State is not as simple as it was in the days of Aristotle. Owing to the manifold expansion of the functions of the State, all residuary functions have practically passed into the hands of the Executive. The executive power may, therefore, be shortly defined as 'the power of carrying on the business of government' or 'the administration of the affairs of the State', excepting functions which are vested by the Constitution in any other authority. The ambit of the executive power has been thus explained by *our* Supreme Court[9]—

> "It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away, subject, of course, to the provisions of the Constitutions or of any law...
>
> The executive function comprises both the determination of the policy as well as carrying it into execution, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact, the carrying on or supervision of the general administration of the State."[9]

Constitutional limitations on President's powers.

Before we take up an analysis of the different powers of the Indian President, we should note the *constitutional limitations* under which he is to exercise his executive powers.

Firstly, he must exercise these powers according to the Constitution [*Art.* 53(1)]. Thus, Art. 75(1) explicity requires that Ministers (other than the Prime Minister) can be appointed by the President only on the advice of the Prime Minister. There will be a violation of this provision if the President appoints a person as Minister from outside the list submitted by the Prime Minister. If the President violates any of the mandatory provisions of the Constitution, he will be liable to be removed by the process of impeachment.

Secondly, the executive powers shall be exercised by the President of India *in accordance with the* advice of his Council of Ministers [*Art.* 74(1)].

The 42nd Amendment.

I. Prior to 1976, there was no express provision in the Constitution that the President was bound to act in accordance with the advice tendered by the Council of Ministers, though it was *judicially established*[10] that the President of India was not a real executive, but a constitutional head, who was bound to act according to the advice of Ministers, so long as they commanded the confidence of the majority in the House of the People [*Art.* 75(3)].[10] The 42nd Amendment Act, 1976 amended Art. 74(1) to clarify this position.

Article 74(1), as so amended, reads:

> "*There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.*"

The word 'shall' makes it obligatory for the President to act in accordance with ministerial advice.

The 44th Amendment.

II. The Janata Government *retained* the foregoing text of Art. 74(1), as amended by the 42nd Amendment Act. But by the 44th Amendment Act, a Proviso was added to Art. 74(1) as follows:

"Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration."

The net result after the 44th Amendment, therefore, is that except in certain marginal cases referred to by the Supreme Court[10] (to be noticed presently), the President shall have no power to act in his discretion in any case. He *must* act according to the advice given to him by the Council of Ministers, headed by the Prime Minister, so that refusal to act according to such advice will render him liable to impeachment for violation of the Constitution. This is subject to the President's power to send the advice received from the Council of Ministers, in a particular case, back to them for their reconsideration; and if the Council of Ministers adhere to their previous advice, the President shall have no option but to act in accordance with such advice. The power to return for reconsideration can be exercised only once, on the same matter.

It may be said, accordingly, that the powers of the President will be the powers of his Ministers, in the same manner as the prerogatives of the English Crown have become the 'privileges of the people' (*Dicey*).[11] An inquiry into the powers of the Union Government, therefore, presupposes an inquiry into the provisions of the Constitution which vest powers and functions in the President.

The various powers that are included within the comprehensive expression 'executive power' in a modern State have been classified by political scientists under the following heads:

(a) *Administrative power, i.e.*, the execution of the laws and the administration of the departments of government.

(b) *Military power, i.e.*, the command of the armed forces and the conduct of war.

(c) *Legislative power, i.e.*, the summoning, prorogation, etc., of the legislature, initiation of and assent to legislation and the like.

(d) *Judicial power, i.e.*, granting of pardons, reprieves, etc., to persons convicted of crime.

The Indian Constitution, by its various provisions, vests power in the hands of the President under each of these heads, subject to the limitations just mentioned.

I. *The Administrative Power.* In the matter of administration, not being a real head of the Executive like the American President, the Indian President shall *not* have any administrative function to discharge nor shall he have that power of control and supervision over the Departments of the Government as the American President possesses. But though the various Departments of Government of the Union will be carried on under the control and responsibility of the respective Ministers in charge, the President will remain the *formal* head of the administration, and as such, all executive action of the Union must be expressed to be taken in the *name* of the President. The only mode of ascertaining whether an order or instrument is made by the Government of India will be to see whether it is expressed in the name of the President and authenticated in such manner as may be prescribed by rules to be made by the President [*Art.* 77]. For the same reason, all contracts and assurances of property made on behalf of the Government of India must be expressed to be made by the President and executed in such manner as the President may direct or authorise [*Art.* 299].

Again, though he may not be the 'real' head of the administration, all officers of the Union shall be his 'subordinates' [*Art.* 53(1)] and he shall have a right to be informed of the affairs of the Union [*Art.* 78(b)].

The administrative power also includes the power to *appoint and remove* the high dignitaries of the State. Under *our* Constitution, the President shall have the power to appoint—(i) The Prime Minister of India. (ii) Other Ministers of the Union. (iii) The Attorney-General for India. (iv) The Comptroller and Auditor-General of India. (v) The Judges of the Supreme Court. (vi) The Judges of the High Courts of the States. (vii) The Governor of a State. (viii) A Commission to investigate interference with water-supplies. (ix) The Finance Commission. (x) The Union Public Service Commission and Joint Commissions for a group of States. (xi) The Chief Election Commissioner and other members of the Election Commission. (xii) A Special Officer for the Scheduled Castes and Tribes. (xiii) A Commission to report on the administration of Scheduled Areas. (xiv) A Commission to investigate into the condition of backward classes. (xv) A Commission on Official Language. (xvi) Special Officer for linguistic minorities.

In making some of the appointments, the President is required by the Constitution to consult persons other than his ministers as well. Thus, in appointing the Judges of the Supreme Court the President shall consult the Chief Justice of India and such other Judges of the Supreme Court and of the High Courts as he may deem necessary [*Art.* 124(2)]. These conditions will be referred to in the proper places, in connection with the different offices.

The President shall also have the power to remove (i) his Ministers, individually; (ii) the Attorney-General for India; (iii) the Governor of a State; (iv) the Chairman or a member of the Public Service Commission of the Union or of a State, on the report of the Supreme Court; (v) a Judge of the Supreme Court or of a High Court or the Election Commissioner, on an address of Parliament.

No 'Spoils System'.

It is to be noted that besides the power of appointing the above specified functionaries, the Indian Constitutions does not vest in the President any absolute power to appoint *inferior officers* of the Union as is to be found in the *American* Constitution. The Indian Constitution thus seeks to avoid the undesirable 'spoils system' of America, under which about 20 per cent of the federal civil offices are filled in by the President, without consulting the Civil Service Commission, and as a reward for party allegiance. The Indian Constitution avoids the vice of the above system by making the 'Union Public Services and the Union Public Service Commission'—a legislative subject for the Union Parliament, and by making it obligatory on the part of the President to consult the Public Service Commission in matters relating to appointment [*Art.* 320(3)], except in certain specified cases. If in any case the President is unable to accept the advice of the Union Public Service Commission, the Government has to explain the reasons therefor in Parliament. In the matter of removal of the civil servants, on the other hand, while those serving under the Union hold office during the President's pleasure, the Constitution has hedged in the President's pleasure by laying down certain conditions and procedure subject to which only the pleasure may be exercised [*Art.* 311(2)].

II. *The Military Power.* The military powers of the Indian President shall be lesser than those of either the American President or of the English Crown.

The Supreme command of the Defence Forces is, of course, vested in the President of India, but the Constitution expressly lays down that the exercise of this power shall be regulated by law [*Art.* 53(2)]. This means that though the President may have the power to take action as to declaration of war or peace or the employment of the Defence Forces, it is competent for Parliament to regulate or control the exercise of such powers. The President's powers as Commander-in-Chief cannot be construed, as in the U.S.A., as a power independent of legislative control.

Secondly, since the Constitution enjoins that certain acts cannot be done without the authority of law, it must be held that such acts cannot be done by the President without approaching Parliament for sanction, *e.g.,* acts which involve the expenditure of money [*Art.* 114(3)], such as the raising, training and maintenance of the Defence Forces.

III. *The Diplomatic Power.* The diplomatic power is a very wide subject and is sometimes spoken of as identical with the power over foreign or external affairs, which comprise "all matters which bring the Union into relation with any foreign country". The legislative power as regards these matters as well as the power of making treaties and implementing them, of course, belongs to Parliament. But though the *final* power as regards these things is vested in Parliament, the Legislature cannot take the initiative in such matters. The task of *negotiating* treaties and agreements with other countries, subject to ratification by Parliament, will thus belong to the President, acting on the advice of his Ministers.

Again, though diplomatic representation as a subject of legislation belongs to Parliament, like the heads of other States, the President of India will represent India in international affairs and will have the power of appointing Indian representatives to other countries and of receiving diplomatic representatives of other States, as shall be recognised by Parliament.

IV. *Legislative Powers.* Like the Crown of England, the President of India is a component part of the Union Parliament and here is one of the instances where the Indian Constitution departs from the principle of Separation of Powers underlying the Constitution of the United States. The legislative powers of the Indian President, of course according to ministerial advice, [*Art.* 74(1)] are various and may be discussed under the following heads:

(a) Summoning, Prorogation, Dissolution.

Like the English Crown *our* President shall have the power to summon or prorogue the Houses of Parliament and to dissolve the lower House.[12] He shall also have the power to summon a joint sitting of both Houses of Parliament in case of a deadlock between them [*Arts.* 85, 108].

(b) The Opening Address.

The President shall address both Houses of Parliament assembled together, at the first session after each general election to the House of the People and at the commencement of the first session of each year, and "inform Parliament of the causes of its summons" [*Art.* 87].

The practice during the last five decades shows that the President's Opening Address is being used for purposes similar to those for which the 'Speech from the Throne' is used in England, *viz.*, to announce the programme of the Cabinet for the session and to raise a debate as to the political outlook and matters of general policy or administration. Each House is empowered by the Constitution to make rules for allotting time"for *discussion* of the matters referred to in such address and for the precedence of such discussion over other business of the House."

(c) The Right to Address and to send Messages.

Besides the right to address a joint sitting of both Houses at the commencement of the first session, the President shall also have the right to address either House or their joint sitting, at any time, and to require the attendance of members for this purpose [*Art.* 86(1)]. This right is no doubt borrowed from the English Constitution, but there it is not exercised by the Crown except on ceremonial occasions.

Apart from the right to address, the Indian President shall have the right to send messages to either House of Parliament either in regard to any pending Bill or to other matter, and the House must then consider the message "with all convenient despatch" [*Art.* 86(2)]. Since the time of George III, the English Crown has ceased to take any part in legislative or to influence it and messages are now sent only on formal matters. The American President, on the other hand, possesses the right to recommend legislative measures to Congress by messages though Congress is not bound to accept them.

The Indian President shall have the power to send messages not only on legislative matters but also 'otherwise'. Since the head of the Indian Executive is represented in Parliament by his Ministers, the power given to the President to send messages regarding legislation may appear to be superfluous, unless the President has the freedom to send message differing from the Ministerial policy, in which case again it will open a door for friction between the President and the Cabinet.

It is to be noted that during the fifty nine years of the working of *our* Constitution, the President has not sent any message to Parliament nor addressed it on any occasion other than after each general election and at the opening of the first session each year.

(d) *Nominating Members to the Houses.*

Though the main composition of the two Houses of Parliament is elective, either direct or indirect, the President has been given the power to nominate certain members to both the Houses upon the supposition that adequate representation of certain interests will not be possible through the competitive system of election. Thus,

(i) In the Council of States, 12 members are to be nominated by the President from persons having special knowledge or practical experience of literature, science, art and social service [*Art.* 80(1)]. (ii) The President is also empowered to nominate not more than two members to the House of the People from the Anglo-Indian community, if he is of opinion that the Anglo-Indian community is not adequately represented in that House [*Art.* 331].

(e) *Laying Reports, etc., before Parliament.*

The President is brought into contact with Parliament also through his power and duty to cause certain reports and statements to be laid before Parliament, so that Parliament may have the opportunity of taking action upon them. Thus, it is the duty of the President to cause to be laid before Parliament—(a) the Annual Financial Statement (Budget) and the Supplementary Statement, if any; (b) the report of the Auditor-General relating to the accounts of the Government of India; (c) the recommendations made by the Finance Commission, together with an explanatory memorandum of the action taken thereon; (d) the report of the Union Public Service Commission, explaining the reasons where any advice of the Commission has not been accepted; (e) the report of the Special Officer for Scheduled Castes and Tribes; (f) the report of the Commission on backward classes; (g) the report of the Special Officer for linguistic minorities.

(f) *Previous sanction to legislation.*

The Constitution requires the previous sanction or recommendation of the President for introducing legislation on some matters, though, of course, the Courts are debarred from invalidating any legislation on the ground that the previous sanction was not obtained, where the President has eventually *assented* to the legislation [*Art.* 255]. These matters are:

(i) A Bill for the formation of new States or the alteration of boundaries, etc., of existing States [*Art.* 3]. The exclusive power of *recommending* such legislation is given to the President in order to enable him to obtain the views of the affected States before initiating such legislation.

(ii) A Bill providing for any of the matters specified in Art. 31A(1) [Prov. 1 to Art. 31A(1)].

(iii) A Money Bill [*Art.* 117(1)].

(iv) A Bill which would involve expenditure from the Consolidated Fund of India even though it may not, strictly speaking, be a Money Bill [*Art.* 117(3)].

(v) A Bill affecting taxation in which States are interested, or affecting the principles laid down for distributing moneys to the States, or varying the meaning of the expression of 'agricultural income' for the purpose of taxation of income, or imposing a surcharge for the purposes of the Union under Chap. I of Part XII [*Art.* 274(1)].

(vi) State Bills imposing restrictions upon the freedom of trade [*Art.* 304, *Proviso*].

(g) Assent to legislation and Veto.

Veto over Union Legislation.

(A) *Veto over Union Legislation.* A Bill will not be an Act of the Indian Parliament unless and until it receives the assent of the President. When a Bill is presented to the President, after its passage in both Houses of Parliament, the President shall be entitled to take any of the following three steps:

(i) He may declare his assent to the Bill; or

(ii) He may declare that he withholds his assent to the Bill; or

(iii) He may, *in the case of Bills other than Money Bills,* return the Bill for reconsideration of the Houses, with or without a message suggesting amendments. A Money Bill cannot be returned for reconsideration.

In case of (iii), if the Bill is passed again by both House of Parliament with or without amendment and again presented to the President, it would be obligatory upon him to declare his assent to it [*Art.* 111].

Nature of the Veto power.

Generally speaking, the object of arming the Executive with this power is to prevent hasty and ill-considered action by the Legislature. But the necessity for such power is removed or at least lessened when the Executive itself initiates and conducts legislation or is responsible for legislation, as under the Parliamentary or Cabinet system of Government. As a matter of fact, though a theoretical power of veto is possessed by the Crown in *England,* it has never been used since the time of Queen Anne.

Where, however, the Executive and the Legislature are separate and independent from each other, the Executive, not being itself responsible for the legislation, should properly have some control to prevent undesirable legislation. Thus, in the *United States,* the President's power of veto has been supported on various grounds, such as (a) to enable the President to protect his own office from aggressive legislation; (b) to prevent a particular legislation from being placed on the statute book which the President considers to be unconstitutional (for though the Supreme Court possesses the power to nullify a statute on the ground of unconstitutionality, it can exercise that power only in the case of clear violation of the Constitution, regardless of any question of policy, and only if a proper proceeding is brought before it *after* the statute comes into effect); (c) to check legislation which he deems to be practically inexpedient or, which he thinks does not represent the will of the American people.

From the standpoint of effect on the legislation, executive vetos have been classified as absolute, qualified, suspensive and pocket vetos.

(B) *Absolute Veto.* The *English* Crown possesses the prerogative of absolute veto, and if it refuses assent to any bill, it cannot become law, notwithstanding any vote of Parliament. But this veto power of the Crown has become *obsolete* since 1700, owing to the development of the Cabinet system, under which all public legislation is initiated and conducted in the Legislature by the Cabinet. Judged by practice and usage, thus there is at present no executive power of veto in England.

(C) *Qualified* Veto. A veto is 'qualified' when it can be overridden by an extraordinary majority of the Legislature and the Bill can be enacted as law with such majority vote, overriding the executive veto. The veto of the *American* President is of this class. When a Bill is presented to the President, he may, if he does not assent to it, return the Bill within 10 days, with a statement of his objections, to that branch of Congress in which it originated. Each House of Congress then reconsiders the Bill and if it is adopted again in each House, by a two-thirds vote of the members present,—the Bill becomes a law, notwithstanding the absence of the President's signature. The qualified veto is then overridden. But if it fails to obtain that two-thirds majority, the veto stands and the Bill fails to become law. In the result, the qualified veto serves as a means to the Executive to point out the defects of the legislation and to obtain a reconsideration by the Legislature, but ultimately the extraordinary majority of the Legislature prevails. The qualified veto is thus a useful device in the United States where the Executive has no power of control over the Legislature, by prorogation, dissolution or otherwise.

(D) *Suspensive Veto.* A veto is suspensive when the executive veto can be overridden by the Legislature by an *ordinary* majority. To this type belongs the veto power of the *French* President. If, upon a reconsideration, Parliament passes the Bill again by a simple majority, the President has no option but to promulgate it.

(E) *Pocket Veto.* There is a fourth type of veto called the 'pocket veto' which is possessed by the *American* President. When a Bill is presented to him, he may neither sign the Bill nor return the Bill for reconsideration within 10 days. He may simply let the Bill lie on his desk until the ten-day limit has expired. But, if in the meantime, Congress has adjourned (*i.e.*, before expiry of the period of ten-days from presentation of the Bill to the President), the Bill fails to become a law. This method is known as the 'pocket veto', for, by simply withholding a Bill presented to the President during the last few days of the session of Congress the President can prevent the Bill to become law.

In India.

The veto power of the Indian President is a combination of the absolute, suspensive and pocket vetos. Thus,—

(i) As in *England*, there would be an end to a Bill if the President declares that he withholds his assent from it. Though such refusal has become obsolete in England since the growth of the Cabinet system under which it is the Cabinet itself which is to initiate the legislation as well as to advise a veto, such a provision was made in the Government of India Act, 1935. Even with the introduction of full Ministerial responsibility, the same provision has been incorporated in the Constitution of India. Normally, this power will be exercised only in the case of 'private' members' Bills. In the case of a Government Bill, a situation may, however, be imagined, where after the passage of a Bill and before it is assented to by the President, the Ministry resigns and the next Council of Ministers, commanding a majority in Parliament, advises the President to use his veto power against the Bill. In such a contingency, it would be constitutional on the part of the President to use his veto power even though the Bill had been duly passed by Parliament.[13]

(ii) If, however, instead of refusing his assent outright, the President remits the Bill or any portion of it for reconsideration, a re-passage of the Bill by an *ordinary* majority would compel the President to give his assent. This power of the Indian President, thus, differs from the qualified veto in the United States insofar as no extraordinary majority is required to effect the enactment of a returned Bill. The effect of a return by the Indian President its thus merely 'suspensive'. [As has been stated earlier, this power is not available in the case of Money Bills.]

(iii) Another point to be noted is that the Constitution does not prescribe any time-limit within which the President is to declare his assent or refusal, or to return the Bill. Article 111 simply says that if the President wants to return the Bill, he shall do it 'as soon as possible' after the Bill is presented to him. By reason of this absence of a time-limit, it seems that the Indian President would be able to exercise something like a 'pocket veto', by simply keeping the Bill on his desk for an indefinite time,[14] particularly, if he finds that the Ministry is shaky and is likely to collapse shortly.

(F) *Disallowance of State legislation.* Besides the power to veto Union legislation, the President of India shall also have the power of disallowance or return for reconsideration of a Bill of the State Legislature, which may have been reserved for his consideration by the Governor of the State [*Art.* 201].

Reservation of a State Bill for the assent of the President is a discretionary power[15] of the Governor of a State. In the case of any Bill presented to the Governor for his assent after it has been passed by both Houses of the Legislature of the State, the Governor may, instead of giving his assent or withholding his assent, reserve the Bill for the consideration of the President.

In one case reservation is compulsory, *viz.*, where the law in question would derogate from the powers of the High Court under the Constitution [*Art.* 200, 2nd Proviso].

In the case of a Money Bill so reserved, the President may either declare his assent or withhold his assent. But in the case of a Bill, other than a Money Bill, the President may, instead of declaring his assent or refusing it, direct the Governor to *return* the Bill to the Legislature for reconsideration. In this latter case, the Legislature must reconsider the Bill within six months and if it is passed again, the Bill shall be presented to the President again. But it shall not be obligatory upon the President to give his assent in this case too [*Art.* 201].

It is clear that a Bill which is reserved for the consideration of the President shall have no legal effect until the President declares his assent to it. But no time limit is imposed by the Constitution upon the President either to declare his assent or that he withholds his assent. As a result, it would be open to the President to keep a Bill of the State Legislature pending at his hands for an indefinite period of time, without expressing his mind.

Disallowance of State legislation.

In a strictly Federal Constitution like that of the *United States,* the States are autonomous within their sphere and so there is no scope for the Federal Executive to veto measures passed by the State Legislatures. Thus, in the Constitution of *Australia,* too, there is no provision for reservation of a State Bill for the assent of the Governor-General and the latter has no power to disallow State Legislation.

But *India* has adopted a federation of the Canadian type. Under the *Canadian* Constitution the Governor-General has the power not only of refusing his assent to a Provincial legislation, which has been reserved by the Governor for the signification of the Governor-General's assent, but also of directly disallowing a Provincial Act, even where it has not been reserved by the Governor for his assent. These powers thus give the Canadian Governor-General a control over Provincial legislation, which is unknown in the United States of America or Australia. This power has, in fact, been exercised by the Canadian Governor-General not only on the ground of encroachment upon Dominion powers, but also on grounds of policy, such as injustice, interference with the freedom of criticism and the like. The Provincial Legislature is to this extent subordinate to the Dominion Executive.

There is no provision in the Constitution of India for a direct disallowance of State legislation by the Union President, but there is provision for disallowance of such bills as are *reserved* by the State Governor for assent of the President. The President may also direct the Governor to return the Bill to the State Legislature for reconsideration; if the Legislature again passes the Bill by an ordinary majority, the Bill shall be presented again to the President for his reconsideration. But if he refuses his assent again, the Bill fails. In short, there is no means of overriding the President's veto, in the case of State legislation. So, the Union's control over State legislation shall be absolute, and no grounds are limited by the Constitution upon which the President shall be entitled to refuse his assent. As to reservation by the Governor, it is to be remembered that the Governor is a nominee of the President. So, the power of direct disallowance will be virtually available to the President through the Governor.

These powers of the President in relation to State legislation will thus serve as one of the bonds of Central control, in a federation tending towards the unitary type.

(h) *The Ordinance-making Power.*

The President shall have the power to legislate by Ordinances at a time when it is not possible to have a Parliamentary enactment on the subject, immediately [*Art.* 123].

The ambit of this Ordinance-making power of the President is co-extensive with the legislative powers of Parliament, that is to say, it may relate to any subject in respect of which Parliament has the right to legislate and is subject to the same constitutional limitations as legislation by Parliament. Thus, an Ordinance cannot contravene the Fundamental Rights any more than an Act of Parliament. In fact, Art.13(3)(a) doubly ensures this position by laying down that " 'law' includes an 'Ordinance'."

Subject to this limitation, the Ordinance may be of any nature as Parliamentary legislation may take, *e.g.*, it may be retrospective or may amend or repeal any law or Act of Parliament itself. Of course, an Ordinance shall be of temporary duration.

This independent power of the Executive to legislate by Ordinance is a relic of the Government of India Act, 1935, but the provisions of the Constitution differ from that of the Act of 1935 in several material respects as follows:

Firstly, this power is to be exercised by the President on the advice of his Council of Ministers (and not in the exercise of his 'individual judgment' as the Governor-General was empowered to act, under the Government of India Act, 1935).

Secondly, the Ordinance must be laid before Parliament when it reassembles, and shall automatically cease to have effect at the expiration of six weeks from the date of re-assembly unless disapproved earlier by Parliament. In other words an Ordinance can exist at the most only for six weeks from the date of re-assembly. If the Houses are summoned to re-assemble on different dates the period of six weeks is to be counted from the later of those dates.

Thirdly, the Ordinance-making power will be available to the President only when *either* of the two Houses of Parliament has been prorogued or is otherwise not in session, so that it is not possible to have a law enacted by Parliament. He shall have no such power while both Houses of Parliament are in session. The President's Ordinance-making power under the Constitution is, thus, *not* a co-ordinate or parallel power of legislation available while the Legislature is capable of legislating.

Any legislative power of the executive (independent of the legislature) is unimaginable in the *U.S.A.*, owing to the doctrine of Separation of Powers underlying the American Constitution and even in *England*, since the *Case of Proclamations* [(1610) 2 St. Tr. 723]. But the power to make Ordinances during recesses of Parliament has been justified in *India*, on the ground that the President should have the power to meet with a pressing need for legislation when either House is not in session.

> "It is not difficult to imagine cases where the powers conferred by the ordinary law existing at any particular moment may be difficult to deal with a situation which may suddenly and immediately arise. The Executive must have the power to issue an Ordinance as the Executive cannot deal with the situation by resorting to the ordinary process of law because the Legislature is not in session."

Even though the legislature is not in session, the President cannot promulgate an Ordinance unless he is satisfied that there are circumstances which render it necessary for him to take 'immediate action'. Clause (1) of Art. 123 says—

> "If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require."

Possibility of abuse of the Ordinance making power.

But 'immediate action' has no necessary connection with an 'emergency' such as is referred to in Art. 352. Hence, the promulgation of an Ordinance is not dependent upon the existence of an armed rebellion or external aggression. The only test is whether the circumstances which call for the legislation are so serious and imminent that the delay involved in summoning the Legislature and getting the measure passed in the ordinary course of legislation cannot be tolerated. But the sole judge of the question whether such a situation has arisen is the President himself and it was held in some earlier cases a Court cannot enquire into the propriety of his satisfaction even where it is alleged that the power was not exercised in good faith.[16]

But if on the expiry of an Ordinance it is repromulgated and this is done repeatedly then it is an abuse of the power and a fraud on the Constitution.[17]

In *Cooper's* case,[18] however, the Supreme Court expressed the view that the genuineness of the President's satisfaction could possibly be challenged in a court of law on the ground that it was *mala fide, e.g.,* where the President has prorogued a House of Parliament in order to make an Ordinance relating to a controversial matter, so as to by-pass the verdict of the Legislature.

The 38th Amendment.

(I) The Indira Government wanted to silence any such judicial interference in the matter of making an Ordinance by inserting Cl. (4) in Art. 123, laying down that the President's satisfaction shall be *final* and could not be questioned in *any* Court on *any* ground.

The 44th Amendment.

(II) The Janata Government overturned the foregoing change. The net result is that the observation in *Cooper's* case[18] re-enters the field and the door for judicial interference in a case of *mala fides* is reopened.[16] To establish *mala fides* may not be an easy affair; but the revival of *Cooper's* observation[18] may serve as a potential check on any arbitrary power to prorogue the House of Parliament in order to legislate by Ordinance.

It is true that when the Ordinance-making power is to be exercised on the advice of a Ministry which commands a majority in Parliament, it makes little difference that the Government seeks to legislate by an Ordinance instead of by an Act of Parliament, because the majority would have ensured a safe passage of the measure through Parliament even if a Bill had been brought instead of promulgating the Ordinance. But the argument would not hold good where the Government of the day did *not* carry an overwhelming majority. Article 123 would, in such a situation, enable the Government to enact a measure for a temporary period by an Ordinance, not being sure of support in Parliament if a Bill had been brought. Even where the Government has a clear majority in Parliament, a debate in Parliament which takes place where a Bill is introduced not only gives a nation-wide publicity to the 'pros and cons' of the measure but also gives to the two Houses a chance of making amendments to rectify unwelcome features or defects as may be revealed by the debate. All this would be absent where the Government elects to legislate by Ordinance. It is evident, therefore, that there is a likelihood of the power being abused even though it is exercisable on the advice of the Council of Ministers,[19] because the Ministers themselves might be tempted to resort to an Ordinance simply to avoid a debate in Parliament[16] and may advise the President to prorogue Parliament at any time, having this specific object in mind.

Parliamentary safeguard.

It is clear that there should be some safeguard against such abuse. So far as the merits of the Ordinance are concerned, Parliament, of course, gets a chance to review the measure when Government seeks to introduce a Bill to replace it. It may also pass resolutions disapproving of the Ordinance, if and when the Government is obliged to summon the Parliament for other purposes [*Art.* 123(2)(a)]. But the real question is how to enable Parliament to tell the Government, short of passing a vote of censure or of no-confidence, that it does not approve of the conduct of the Government in making the Ordinance instead of bringing a Bill for the purpose? The House of the people has made a Rule requiring that whenever the Government seeks to replace an Ordinance by a Bill, a statement "explaining the circumstances which necessitated immediate legislation by Ordinance" must accompany such Bill. The statement merely informs the House of the grounds advanced by the Government. A general discussion takes place on the resolution approving the Ordinance and generally a resolution is moved by the opposition disapproving the Ordinance.

(V) *The Pardoning Power.* Almost all Constitutions confer upon the head of the Executive the power of granting pardons to persons who have been tried and convicted of some offence. The object of conferring this 'judicial' power upon the Executive is to correct possible judicial errors, for, no human system of judicial administration can be free from imperfections.

In *Kehar Singh's* case[20] the following principles were laid down (a) The convict seeking relief has no right to insist on oral hearing, (b) No guideline need be laid down by the Supreme Court for the exercise of the power, (c) The power is to be exercised by the President on the advice of the Central Government, (d) The President can go into the merits of the case and take a different view, (e) Exercise of the power by the President is not open to judicial review, except to the limited extent as indicated in *Maru Ram's* case.[21] The Court can interfere only where the Presidential decision is wholly irrelevant to the object of Art. 72 or is irrational, arbitrary, discriminatory or *mala fide*.

It should be noted that what has been referred to above as the 'pardoning power' comprises a group of analogous powers each of which has a distinct significance and distinct legal consequences, *viz.*, pardon, reprieve, respite, remission, suspension, commutation. Thus, while a *pardon rescinds* both the sentence and the conviction and absolves the offender from all punishment and disqualifications, *commutation* merely substitutes one form of punishment for another of a lighter character, *e.g.*, each of the following sentences may be commuted for the sentence next following it: death; rigorous imprisonment; simple imprisonment; fine. *Remission,* on the other hand, reduces the amount of sentence without changing its character, *e.g.*, a sentence of imprisonment for one year may be remitted to six months. *Respite* means awarding a lesser sentence instead of the penalty prescribed, in view of some special fact, *e.g.*, the pregnancy of a woman offender. *Reprieve* means a stay of execution of a sentence, *e.g.*, pending a proceeding for *pardon* or *commutation.*

Pardoning power of President and Governor compared.

Under the Indian Constitution, the pardoning power shall be possessed by the President as well as the State Governors, under Arts. 72 and 161, respectively as follows—

	President		*Governor*
1.	Has the power to grant pardon, reprieve, respite, suspension, remission or commutation in respect of punishment or sentence by *court-martial.*	1.	No such power.
2.	Do., where the punishment or sentence is for an offence against a law relating to a matter to which the *executive power of the union extends.*	2.	Powers similar to those of President in respect of an offence against a law relating to a matter to which the *executive power of the State* extends (except as to death sentence for which see *below*).
3.	Do., in *all cases* where the sentence is one of *death.*	3.	No power to pardon in case of sentence of death. But the power to suspend, remit or commute a sentence of death, if conferred by law, remains, unaffected.

In the result, the President shall have the pardoning power in respect of—

(i) All cases of punishment by a Court Martial. (The Governor shall have no such power.)

(ii) Offences against laws made under the Union and Concurrent Lists. (As regards laws in the Concurrent sphere, the jurisdiction of the President shall be concurrent with that of the Governor.) Separate provision has been made as regards sentences of death.

(iii) The *only* authority for pardoning a sentence of death is the President.

But though the Governor has no power to pardon a sentence of death; he has, under s. 54 of the Indian Penal Code and ss. 432-433 of the Criminal Procedure Code, 1973, the power to suspend, remit or commute a sentence of death in certain circumstances. This power is left intact by the Constitution, so that as regards suspension, remission or commutation, the Governor shall have a concurrent jurisdiction with the President.

(VI) *Miscellaneous Powers.* As the head of the executive power, the President has been vested by the Constitution with certain powers which may be said to be residuary in nature, and are to be found scattered amongst numerous provisions of the Constitution. Thus,

Rule-making Power.

(a) The President has the constitutional authority to make *rules* and regulations relating to various matters, such as, how his orders and instruments shall be authenticated; the paying into custody of and withdrawal of money from, the public accounts of India; the number of members of the Union Public Service Commission, their tenure and conditions of service; recruitment and conditions of service of persons serving the Union and the secretarial staff of Parliament; the prohibition of simultaneous membership of Parliament and of the Legislature of a State; the procedure relating to the joint sittings of the Houses of Parliament in consultation with the Chairman and the Speaker of the two Houses; the manner of enforcing the orders of the Supreme Court; the allocation among States of emoluments payable to a Governor appointed for two or more States; the discharge of the functions of a Governor in any contingency not provided for in the Constitution; specifying Scheduled Castes and Tribes; specifying matters on which it shall not be necessary for the Government of India to consult the Union Public Service Commission.

(b) He has the power to give instructions to a Governor to promulgate an Ordinance if a Bill containing the same provisions requires the previous sanction of the President under the Constitution [*Art.* 213(1), Proviso].

(c) He has the power to refer any question of public importance for the opinion of the Supreme Court and already 14 such references have been made since 1950 till 2007. The last one has not yet been decided. [*Art.* 143; see Chap. 22 under 'Advisory Jurisdiction'].

(d) He has the power to appoint certain Commissions for the purpose of reporting on specific matters, such as, Commissions to report on the administration of Schedules Areas and welfare of Scheduled Tribes and Backward Classes; the Finance Commission; Commission on Official Language; an Inter-State Council.

(e) He has some special powers relating to 'Union Territories', or territories which are directly administered by the Union. Not only is the administration of such Territories to be carried on by the President through an Administrator, responsible to the President alone, but the President has the final legislative power (to make regulations) relating to the Andaman and Nicobar Islands; the Lakshadweep; Dadra and Nagar Haveli;[22] and may even repeal or amend any law made by Parliament as may be applicable to such Territories [*Art.* 240].

(f) The President shall have certain special powers in respect of the administration of Scheduled Area and Tribes, and Tribal Area in Assam:

(i) Subject to amendment by Parliament, the president shall have the power, by order, to declare an area to be a Scheduled Area or declare that an area shall cease to be a Scheduled Area, alter the boundaries of Scheduled Areas, and the like [Fifth *Sch., Para* 6.]

(ii) A Tribes Council may be established by the direction of the President in any State having Scheduled Areas and also in States having Scheduled Tribes therein *but* not Scheduled Areas [Fifth *Sch., Para* 4].

(iii) All regulations made by the Governor of a State for the peace and good government of the Scheduled Areas of the State must be submitted forthwith to the President and until assented to by him, such regulations shall have no effect [Fifth *Sch., Para* 5(4)].

(iv) The President may, at any time, require the Governor of a State to make a report regarding the administration of the Scheduled Areas in that State and give directions as to the administration of such Areas [*Sch.* V, *Para* 3].

(g) The President has certain special powers and responsibilities as regards Scheduled Castes and Tribes:

(i) Subject to modification by Parliament, the President has the power to draw up and notify the lists of Scheduled Castes and Tribes in each State and Union Territory. Consultation with the Governor is required in the case of the list relating to a State [*Arts.* 341-342].

(ii) The President shall appoint a Special Officer to investigate and report on the working of the safeguards provided in the Constitution for the Scheduled Castes and Tribes [*Art.* 338].

(iii) The President may at any time and shall at the expiration of ten years from the commencement of the Constitution, appoint a Commission for the welfare of the Scheduled Tribes in the States [*Art.* 339].

(VII) *Emergency Powers.* The foregoing may be said to be an account of the President's normal powers. Besides these, he shall have certain extraordinary powers to deal with emergencies, which deserve a separate treatment [Chap. 28, *post*]. For the present, it may be mentioned that the situations that would give rise to these extraordinary powers of the President are of three kinds :

(a) *Firstly,* the President is given the power to make a "Proclamation of Emergency" on the ground of threat to the security of India or any part thereof, by war, external aggression or *armed rebellion.*[23] The object of this Proclamation is to maintain the security of India and its effect is, *inter alia,* assumption of wider control by the Union over the affairs of the States or any of them as may be affected by armed rebellion or external aggression.

(b) *Secondly,* the President is empowered to make a Proclamation that the Government of a State cannot be carried on in accordance with the provisions of the Constitution. The break-down of the constitutional machinery may take place either as a result of a political deadlock or the failure by a State to carry out the directions of the Union [*Arts.* 356, 365]. By means of a Proclamation of this kind, the President may assume to himself any of the governmental powers of the State and to Parliament the powers of the Legislature of the State.

(c) *Thirdly*, the President is empowered to declare that a situation has arisen whereby "the financial stability or credit of India or of any part thereof is threatened" [*Art.* 360]. The object of such Proclamation is to maintain the financial stability of India by controlling the expenditure of the States and by reducing the salaries of the public servants, and by giving directions to the States to observe canons of financial propriety, as may be necessary.

3. The Council of Ministers

The framers of *our* Constitution intended that though formally all executive powers were vested in the President, he should act as the constitutional head of the Executive like the English Crown, acting on the advice of Ministers responsible to the popular House of the Legislature.

A body recognised by the Constitution.

But while the *English* Constitution leaves the entires system of Cabinet Government to convention, the Crown being legally vested with absolute powers and the Ministers being in theory nothing more than the servants of the Crown, the framers of *our* Constitution enshrined the foundation of the Cabinet system in the body of the written Constitution itself, though, of course, the details of its working had necessarily to be left to be filled up by convention and usage.[24]

Appointment of Ministers.

While the Prime Minister is selected by the President, the other Ministers are appointed by the President on the advice of the Prime Minister [*Art.* 75(1)] and the allocation of portfolios amongst them is also made by him. Further, the President's power of dismissing an individual Minister is virtually a power in the hands of the Prime Minister. In selecting the Prime Minister, the President must obviously be restricted to the leader of the party in majority in the House of the People, or, a person who is in a position to win the confidence of the majority in that House.

Council of Ministers and Cabinet.

The number of members of the Council of Ministers is not specified in the Constitution. It is determined according to the exigencies of the time. At the end of 1961, the strength of the Council of Ministers of the Union was 47, at the end of 1975, it was raised to 60, and in 1977, it was reduced to 24, while in July 1989, it was again raised to 58. The National Front Government (headed by Sri V.P. Singh) started with only 22 Ministers. All the Ministers, however, do not belong to the same rank.[25] The National Democratic Alliance Government (headed by Mr. A.B. Bajpai) had 29 Cabinet Ministers and 44 State Ministers (no Deputy Ministers). However, sub-clause (1A) has been inserted to Art. 75 by the Constitution (Ninety-first Amendment) Act, 2003 which provides that the total number of Ministers, including the Prime Minister, shall not exceed 15% of the total number of the members of the

House of People (w.e.f. 1.1.2004). The Constitution does not classify the members of the Council of Ministers into different ranks. All this has been done informally, following the English practice. It has now got legislative sanction, so far as the Union is concerned, in s. 2 of the Salaries and Allowances of Ministers Act, 1952, which defines "Minister" as a "Member of the Council of Ministers, by whatever name called, and includes a Deputy Minister."[25]

Salaries of Ministers.

The Council of Ministers is thus a composite body, consisting of different categories. At the Centre, these categories are three, as stated above. The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine. Each Minister gets a sumptuary allowance at a varying scale, according to his rank, and a residence, free of rent.

The rank of the different Ministers is determined by the Prime Minister according to whose advice the President appoints the Ministers [*Art.*75(1)], and also allocates business amongst them [*Art.*77]. While the Council of Ministers is collectively responsible to the House of the People [Art. 75(3)], Art. 78(c) enjoins the Prime Minister, when required by the President, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council,—in practice, the Council of Ministers seldom meets as a body. It is the Cabinet, an inner body *within the Council,* which shapes the policy of the Government.

While Cabinet Ministers attend meetings of the Cabinet of their own right, Ministers of State are not members of the Cabinet and they can attend only if invited to attend any particular meeting. A Deputy Minister assists the Minister in charge of a Department of Ministry and takes no part in Cabinet deliberations.

Ministers may be chosen from members of either House and a Minister who is a member of one House has a right to speak in and to take part in the proceedings of the other House though he has no right to vote in the House of which he is not a member [*Art.* 88].

Under *our* Constitution, there is no bar to the *appointment* of a person from outside the Legislature as Minister. But he cannot continue as Minister for more than 6 months unless he secures a seat in either House of Parliament (by election or nomination, as the case may be), in the meantime. Article 75(5) says—

> "A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister."

Ministerial Responsibility to Parliament.

As to Ministerial responsibility, it may be stated that the Constitution follows in the main the English principle except as to the *legal* responsibility of individual Ministers for acts done by or on behalf of the President.

Collective Responsibility.

(A) The principle of collective responsibility is codified in Art. 75(3) of the Constitution—

> "The Council of Ministers shall be collectively responsible to the House of the People."

So, the Ministry, as a body, shall be under a constitutional obligation to resign as soon as it loses the confidence of the popular House of the Legislature. The collective responsibility is to the House of the People even though some of the Ministers may be members of the Council of States.

The 'collective responsibility' has two meanings : the first that all the members of a government are unanimous in support of its policies and exhibit that unanimity on public occasions although while formulating the policies, they might have differed in the cabinet meeting; the second that the Ministers, who had an opportunity to speak for or against the policies in the Cabinet are thereby personally and morally responsible for their success and failure.[26]

Of course, instead of resigning, the Ministry shall be competent to advise the President or the Governor to exercise his power of dissolving the Legislature, on the ground that the House does not represent the views of the electorate faithfully.

Individual Responsibility to the President.

(B) The principle of individual responsibility to the head of the State is embodied in Art. 75(2)—

> "The Ministers shall hold office during the pleasure of the President."

The result, is that though the Ministers are collectively responsible to the Legislature, they shall be individually responsible to the Executive head and shall be liable to dismissal even when they may have the confidence of the Legislature. But since the Prime Minister's advice will be available in the matter of dismissing other Ministers individually, it may be expected that this power of the President will virtually be, as in England, a power of the Prime Minister against his colleagues,—to get rid of an undesirable colleague even where that Minister may still possess the confidence of the majority in the House of the People. Usually, the Prime Minister exercises this power by asking an undesirable colleague to resign, which the latter readily complies with, in order to avoid the odium of a dismissal.

Legal Responsibility.

(C) But, as stated earlier, the English principle of legal responsibility has not been adopted in *our* Constitution. In *England,* the Crown cannot do any public act without the counter-signature of a Minister who is liable in a Court of law if the act done violates the law of the land and gives rise to a cause of action in favour of an individual. But *our* Constitution does not expressly say that the President can act only *through* Ministers and leaves it to the President to make rules as to how his orders, etc., are to be authenticated; and on the other hand, provides that the Courts will not be entitled to enquire what advice was tendered by the Ministers to the executive head. Hence, if an act of the President is, according to the rules made by him, authenticated by a Secretary to the Government of India, there is no scope for a Minister being legally responsible for the act even though it may have been done on the advice of the Minister.

Special position of the Prime Minister in the Council of Ministers.

As in England, the Prime Minister is the "keystone of the Cabinet arch". Article 74(1) of *our* Constitution expressly states that the Prime Minister shall be "at the head" of the Council of Ministers. Hence, the other Ministers cannot function when the Prime Minister dies or resigns.

In *England*, the position of the Prime Minister has been described by Lord MORLEY as '*primus inter pares*', *i.e.*, 'first among equals'. In theory, all Ministers or members of the Cabinet have an equal position, all being advisers of the Crown, and all being responsible to Parliament in the same manner. Nevertheless, the Prime Minister has a pre-eminence, by convention and usage. Thus,—

(a) The Prime Minister is the leader of the party in majority in the popular House of the legislature.

(b) He has the power of selecting the other Ministers and also advising the Crown to dismiss any of them individually, or require any of them to resign. Virtually, thus, the other Ministers hold office at the pleasure of the Prime Minister.

(c) The allocation of business amongst the Ministers is a function of the Prime Minister. He can also transfer a Minister from one Department to another.

(d) He is the chairman of the Cabinet, summons its meetings and presides over them.

(e) While the resignation of other Ministers merely creates a vacancy, the resignation or death of the Prime Minister dissolves the Cabinet.

(f) The Prime Minister stands between the Crown and the Cabinet. Though individual Ministers have the right of access to the Crown on matters concerning their own departments, any important communication, particularly relating to policy, can be made only through the Prime Minister.

(g) He is in charge of co-ordinating the policy of the Government and has, accordingly, a right of supervision over all the departments.

In *India,* all these special powers will belong to the Prime Minister inasmuch as the conventions relating to Cabinet Government are, in general, applicable. But some of these have been codified in the Constitution itself. The power of advising the President as regards the appointment of other Ministers is, thus, embodied in Art. 75(1). As to the function of acting as the channel of communication between the President and the Council of Ministers, Art. 78 provides—

> "It shall be the duty of the Prime Minister—
>
> (a) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation;
>
> (b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and
>
> (c) if the President so requires to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council."

Thus, even though any particular Minister has tendered any advice to the President without placing it before the Council of Ministers, the President has (through the Prime Minister) the power to refer the matter to be considered by the Council of Ministers. The unity of the Cabinet system will thus be enforced in India through the provisions of the written Constitution.

4. The President in relation to his Council of Ministers.

It is no wonder that the position of the President under *our* Constitution has evoked much interest amongst political scientists in view of the plentitude of powers vested in an elected President holding for a fixed term, saddled with limitations of Cabinet responsibility.

In a Parliamentary form of government, the tenure of office of the virtual executive is *dependent* on the will of the Legislature; in a Presidential Government the tenure of office of the executive is *independent* of the will of the Legislature (*Leacock*). Thus, in the Presidential form of which the model is the *United States*,—the President is the *real* head of the Executive who is elected by the people for a fixed term. He is independent of the Legislature as regards his tenure and is not responsible to the Legislature for his acts. He may, of course, act with the advice of ministers, but they are appointed by him as his *counsellors* and are responsible to him and not to the Legislature. Under the Parliamentary system represented by *England,* on the other hand, the head of the Executive (the Crown) is a mere titular head, and the virtual executive power is wielded by the Cabinet, a body formed of the members of the Legislature and responsible to the popular House of the Legislature for their office and actions.

Indian President compared with American President and English Crown.

Being a Republic, *India* could not have a hereditary monarch. So, an elected President is at the head of the executive power in India. The tenure of his office is for a fixed term of years as of the American President. He also resembles the American President inasmuch as he is removable by the Legislature under the special quasi-judicial procedure of impeachment. But, on the other hand, he is more akin to the English King than the American President insofar as he has no 'functions' to discharge, on his own authority. *All* the powers and 'functions' [*Art.* 74(1)] that are vested by the Constitution in the President are to be exercised on the advice of the Ministers responsible to the Legislature as in England. While the so-called Cabinet of the American President is responsible to himself and not to Congress, the Council of Ministers of *our* President shall be responsible to Parliament.

The reason why the framers of the Constitution discarded the *American* model after providing for the election of the President of the Republic by an electoral college formed of members of the Legislatures not only of the Union but also of the States, has thus been explained[27]: In combining stability with responsibility, they gave more importance to the latter and preferred the system of 'daily assessment of responsibility' to the theory of 'periodic assessment' upon which the American system is founded. Under the American system, conflicts are bound to occur between the Executive, Legislature and Judiciary; and on the other hand, according to many modern American writers the absence of co-ordination between the Legislature and the Executive is a source of weakness of the American political system. What is wanted in India on her attaining freedom from one and a half century of bondage is a *smooth* form of Government which would be conducive to the manifold development of the country without the least friction,—and to this end, the Cabinet or Parliamentary system of Government of which India has already had some experience, is better suited than the Presidential.

A more debatable question that has been raised is whether the Constitution *obliges* the President to act only on the advice of the Council of Ministers, on every matter. The controversy, on this question, was highlighted by a speech delivered by the President Dr. Rajendra Prasad at a ceremony of the Indian Law Institute (November 28, 1960)[28] where he urged for a study of the relationship between the President and the Council of Ministers, observing that—

> "There is no provision in the Constitution which in so many words lays down that the President shall be bound to act in accordance with the advice of his Council of Ministers."

Status of the President of India.

The above observation came in contrast with the words of Dr. Rajendra Prasad himself with which he, as the President of the Constituent Assembly, summed up the relevant provisions of the Draft Constitution:[28]

> "Although there is no specific provision in the Constitution itself making it binding on the President to accept the advice of his ministers, it is hoped that the convention under which in England the King always acted on the adviced of his ministers would be established in this country also and the President would become a constitutional President in all matters."

Politicians and scholars, naturally, took sides on this issue, advancing different provisions of the Constitution to demonstrate that the "President under *our* Constitution is not a figure-head" (*Munshi*)[29] or that he was a mere constitutional head similar to the English Crown.

When the question went up to the Supreme Court, the Court took the latter view, relying on the interpretation of the words 'aid and advise' in the Dominion Constitution Acts, in these words, in *Ram Jawaya's* case[9]:

> "Under article 53(1) of our Constitution the executive power of the Union is vested in the President. But under article 74 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. *The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet.* The same provisions obtain in regard to the Government of States; the Governor, occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is like the British Cabinet, 'a hyphen which joins, a buckle which fastens', the legislative part of the State to the executive part."[9]

The foregoing interpretation[9] was reiterated by the Supreme court in several later decisions,[30] so that, so far as judicial interpretation was concerned, it was settled that the Indian President is a constitutional head of the Executive like the British Crown. In *Rao v. Indira*[30] a unanimous Court observed—

> "The Constituent Assembly did not choose the Presidential system of Government."

The 42nd Amendment.

The Indira Government sought to put the question beyond political controversy, by amending the Constitution itself. Article 74(1) was thus substituted, by the Constitution (42nd Amendment) Act, 1976:

> "(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who *shall, in the exercise of his functions, act in accordance with such advice.*"

The 43rd and 44th Amendments.

Though the Janata Government sought to wipe off the radical changes infused into the Constitution by Mrs. Gandhi's Government, it has *not* disturbed the foregoing amendment made in Art. 74(1). The only change made by the 44th Amendment Act over the 1976-provision is to add a Proviso which gives the President one chance to refer the advice given to the Council of Ministers back for a reconsideration; but if the Council of Ministers reaffirm their previous advice, the President shall be *bound* to act according to that advice. Article 74(1), as it stands after the 44th Amendment, 1978, stands thus:

> "(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.
>
> *Provided* that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration."

The position to-day, therefore, is that the debate whether the President of India has any power to act contrary to the advice given by the Council of Ministers has become *meaningless.* By amending the Constitution in 1976 and 1978, a seal has been put to the controversy which had been mooted by President Rajendra Prasad at the Indian Law Institute[28] that there was no provision in the Indian Constitution to make it obligatory upon the President to act only in accordance with the advice tendered by the Council of Ministers, on each occasion and under all circumstances.

But, at the same time, the amendment so made has erred on the other side, by making it an *absolute* proposition, without keeping any reserve for situations when the advice of a Prime Minister is not available (*e.g.*, in the case of death);[19] or the advice tendered by the Prime Minister is improper, according to British conventions, *e.g.*, when Prime Minister defeated in Parliament successively asks for its dissolution.[31]

(a) So far as the contingency arising from the death of the Prime Minster is concerned, it instantly operates to dissolve the existing Council of Ministers. Hence, it would appear that notwithstanding the 1976-78 amendments of Art. 74(1), the President shall have the power of acting without ministerial advice, during the time taken in the matter of choosing a new Prime Minister, who, of course, must command majority in the House of the People. In this contingency, no Council of Ministers exists, on the death of the erstwhile Prime Minister.

(b) But as regards the contingency arising out of a demand for dissolution by a Prime Minister who is defeated in the House of the People, it cannot be said that no Council of Ministers is in existence. On the amended Art. 74(1), the President of India, must act upon the request of the defeated Council of Ministers even if such request is improper, *e.g.*, on a second occasion of defeat. If so, the position in India would differ from the principles of Cabinet Government as they prevail in the U.K.[24]

5. The Attorney-General for India.

The office of the Attorney-General is one of the offices placed on a special footing by the Constitution. He is the first Law Officer of the Government of India, and as such, his duty shall be—

(i) to give advice on such legal matters and to perform such other duties of a legal character as may, from time to time, be referred or assigned to him by the President; and (ii) to discharge the functions conferred on him by the Constitution or any other law for the time being in force [*Art.* 76].

Though the Attorney-General of India is not (as in England) a member of the Cabinet, he shall also have the right to speak in the Houses of Parliament or in any Committee thereof, but shall have no right to vote [*Art.* 88]. By virtue of his office, he is entitled to the privileges of a member of Parliament [*Art.* 105(4)]. In the performance of his official duties, the Attorney-General shall have a right of audience in all Courts in the territory of India.

The Attorney-General for India shall be appointed by the President and shall hold office during the pleasure of the President. He must have the same qualifications as are required to be a Judge of the Supreme Court. He shall receive such remuneration as the President may determine. He is not a whole-time counsel for the Government nor a Government servant.

6. The Comptroller and Auditor-General of India.

Another pivotal office in the Government of India is that of Comptroller and Auditor-General who controls the entire financial system of the country [*Art.* 148]—at the Union as well as State levels.

As observed by Ambedkar, the Comptroller and Auditor-General of India shall be the most important officer under the Constitution of India. For, he is to be the guardian of the public purse and it is his duty to see that not a farthing is spent out of the Consolidated Fund of India or of a State without the authority of the appropriate Legislature. In short, he shall be the impartial head of the audit and accounts system of India. In order to discharge this duty properly, it is highly essential that this office should be independent of any control of the Executive.

The foundation of parliamentary system of Government, as has been already seen, is the responsibility of the Executive to the Legislature and the essence of such control lies in the system of financial control by the Legislature. In order to enable the Legislature to discharge this function properly, it is essential that this Legislature should be aided by an agency, fully independent of the Executive, who would scrutinise the financial transactions of the Government and bring the results of such scrutiny before the Legislature. There was an Auditor-General of India even under the Government of India Act, 1935, and that Act secured the independence of the Auditor-General by making him irremovable except "in like manner and on the like grounds as a Judge of the Federal Court". The office of the Comptroller and Auditor-General, in the Constitution, is substantially modelled upon that of the Auditor-General under the Government of India Act, 1935.

Conditions of service.

The *independence* of the Comptroller and Auditor-General has been sought to be secured by the following provisions of the Constitution—

a. Though appointed by the President, the Comptroller and Auditor-General may be *removed* only on an address from both Houses of Parliament, on the grounds of (i) 'proved misbehaviour', or (ii) 'incapacity'.

He is thus excepted from the general rule that all civil servants of the Union hold their office at the pleasure of the President [Ch. *Art.* 310(1)].

b. His salary and conditions of service shall be statutory (*i.e.,* as laid down by Parliament by law) and shall not be liable to variation to his disadvantages during his term of office. Under this power, Parliament has enacted the Comptroller and Auditor-General's (Conditions of Service) Act, 1971 which, as amended, provides as follows:

(i) The term of office of the Comptroller and Auditor-General shall be six years from the date on which he assumes office. But—

(a) He shall vacate office on attaining the age of 65 years, if earlier than the expiry of the 6-year term;

(b) He may, at any time, resign his office, by writing under his hand, addressed to the President of India;

(c) He may be removed by impeachment [*Arts.* 148(1); 124(4)].

(ii) His salary shall be equal to that of a Judge of the Supreme Court (which is now Rs. 30,000, w.e.f. 1-1-1996).

(iii) On retirement, he shall be eligible to an annual pension of Rs. 15,000.

(iv) In other matters his conditions of service shall be determined by the Rules applicable to a member of the I.A.S., holding the rank of a Secretary to the Government of India.

(v) He shall be disqualified for any further Government 'office' after retirement[32] so that he shall have no inducement to please the Executive of the Union or of any State.

(vi) The salaries, etc., of the Comptroller and Auditor-General and his staff and the administrative expenses of his office shall be charged upon the Consolidated Fund of India and shall thus be non-votable [*Art.* 148].

On the above points, thus, the position of the Comptroller and Auditor-General shall be similar to that of a Judge of the Supreme Court.[33]

Duties and powers.

The Comptroller and Auditor-General shall perform such *duties* and exercise such *powers* in relation to the accounts of the Union and of the States as may be prescribed by Parliament. In exercise of this power, Parliament has enacted the Comptroller and Auditor-General's (Duties, Powers and Conditions of

Service) Act, 1971, which, as amended in 1976, relieves him of his pre-Constitution duty to *compile* the accounts of the Union; and the States may enact similar legislation with the prior approval of the President,—to separate accounts from audit also at the State level, and to relieve the Comptroller and Auditor-General of his responsibility in the matter of preparation of accounts, either of the States or of the Union.

The material provisions of this Act relating to the duties of the Comptroller and Auditor-General are—

(a) to audit and report on all expenditure from the Consolidated Fund of India and of each State and each Union Territory having a Legislative Assembly as to whether such expenditure has been in accordance with the law;

(b) similarly, to audit and report on all expenditure from the Contingency Funds and Public Accounts of the Union and of the States;

(c) to audit and report on all trading, manufacturing, profit and loss accounts, etc., kept by any Department of the Union or a State;

(d) to audit the receipts and expenditure of the Union and of each State to satisfy himself that the rules and procedures in that behalf are designed to secure an effective check on the assessment, collection and proper allocation of revenue;

(e) to audit and report on the receipts and expenditure of (i) all bodies and authorities 'substantially financed' from the Union or State revenues; (ii) Government companies; (iii) other corporations or bodies, when so required by the laws relating to such corporations or bodies.

Compared with his British counterpart.

As has been just stated, the duty of preparing the accounts was a relic of the Government of India Act, 1935, which has no precedent in the British system, under which the accounts are prepared, not by the Comptroller and Auditor-General, but by the respective Departments. The legislation to separate the function of preparation of accounts from the Comptroller and Auditor-General of India, thus, brings this office at par with that of his British counterpart in one respect.

But there still remains another fundamental point of difference. Though the designation of his office indicates that he is to function both as Comptroller and Auditor, *our* Comptroller and Auditor-General is so far exercising the functions only of an Auditor. In the exercise of his functions as Comptroller, the English Comptroller and Auditor-General controls the receipt and issue of public money and his duty is to see that the whole of the public revenue is lodged in the account of Exchequer at the Bank of England and that nothing is paid out of that account without legal authority. The Treasury cannot, accordingly, obtain any money from the public Exchequer without a specific authority from the Comptroller, and, this he issues on being satisfied that there is proper legal authority for the expenditure. This system of control over issues of the public money not only prevents withdrawal for an unauthorised purpose but also prevents expenditure in excess of the grants made by Parliament.

In India, the Comptroller and Auditor-General has no such control over the *issue* of money from the Consolidated Fund and many Departments are authorised to draw money by issuing cheques without specific authority from the Comptroller and Auditor-General, who is concerend only *at the audit stage* when the expenditure has already taken place. This system is a relic of the past, for, under the Government of India Acts, even the designation 'Comptroller' was not there and the functions of the Auditor-General were ostensibly confined to audit. After the commencement of the Constitution, it was thought desirable that *our* Comptroller and Auditor-General should also have the control over issues as in England, particularly for ensuring that "the grants voted and appropriations made by Parliament are not exceeded". But no action has as yet been taken to introduce the system of Exchequer Control over issues as it has been found that the entire system of accounts and financial control shall have to be overhauled before the control can be centralised at the hands of the Comptroller and Auditor-General.

The functions of the Comptroller and Auditor-General have recently been the subject of controversy, in regard to two questions:

(a) The first is, whether in exercising his function of audit, the Comptroller and Auditor-General has the jurisdiction to comment on extravagance and suggest economy, apart from the legal authority for a particular expenditure. The orthodox view is that when a statute confers power or discretion upon an authority to sanction expenditure, the function of audit comprehends a scrutiny of the *propriety* of the exercise of such power in particular cases, having regard to the interests of economy, besides its legality. But the Government Departments resent on the ground that such interference is incompatible with their responsibility for the administration. In this view, the Departments are supported by academicians such as Appleby,[34] according to whom the question of economy is inseparably connected with the efficiency of the administration and that, having no responsibility for the administration, the Comptroller and Auditor-General or his staff has no competence on the question of economy:

> "Auditors do not know and cannot be expected to know very much about good administration; their prestige is highest with others who do not know much about administration... Auditing is a necessary but highly pedestrian function with a *narrow perspective and very limited usefulness.*" 34

(b) Another question is whether the audit of the Comptroller and Auditor-General should be extended to industrial and commercial undertakings carried on by the Government through private limited companies, who are governed by the Articles of their Association, or to statutory public corporations or undertakings which are governed by statute. It was rightly contended by a former Comptroller and Auditor-General[35] that inasmuch as money is issued out of the Consolidated Fund of India to invest in these companies and corporations on behalf of the Government, the audit of such companies must necessarily be a right and responsibility of the Comptroller and Auditor-General, while, at present, the Comptroller and Auditor-General can have no such power unless the Articles of Association of such companies or the governing statutes provide for audit by the Comptroller and Auditor-General. The result is that the report of the Comptroller and

Auditor-General does not include the results of the scrutiny of the accounts of these corporations and the Public-Accounts Committee or Parliament have little material for controlling these important bodies, spending pubic money. On behalf of the Government, however, this extension of the function of the Comptroller and Auditor-General has been resisted on the ground that the Comtroller and Auditor-General lacks the business or industrial experience which is essential for examining the accounts of these enterprises and that the application of the conventional machinery of the Comptroller and Auditor-General is likely to paralyse these enterprises which are indispensable for national development.

As has just been stated, this defect has been partially remedied by the Act of 1971 which enjoins the Comptroller and Auditor-General to audit and report on the receipts and expenditure of 'Government companies' and other bodies which are 'substantially financed' from the Union or State revenues, irrespective of any specific legislation in this behalf.

REFERENCES

1. For the results of the elections so far held, see Table X.
2. As to how the system of Proportional Representation would work, see Author's *Commentary on the Constitution of India*, 7th Ed., Vol. E/1, pp. 84-90.
3. At the Presidential election held in 2007, the electoral college consisted of 4896 members of which the break-up was 543 Lok Sabha + 233 Rajya Sabha + 4120 State Assembly members.
4. C.A.D. , Vol. IV, pp. 734, 846.
5. In his speech in Parliament in 1961, Prime Minister Nehru observed that we should adopt a *convention* that no person shall be a President for more than two terms, and that no amendment of the Constitution was necessary to enjoin this.
6. Rs. 10,000 originally, raised to Rs. 20,000 in 1990 and to Rs. 50,000 in 1998 (w.e.f. 1-1-1996).
7. The original Constitution provided that the Vice-President would be elected by the two Houses of Parliament, assembled at *a joint meeting.* This cumbrous procedure of a joint meeting of the two Houses for this purpose has been done away with, by amending Art. 66(1) by the Constitution (11th Amendment) Act, 1961. As amended, the members of both Houses remain the voters, but they may vote by secret ballot, without assembling at a joint meeting.
8. Article 65(3) is to be read with para 4 of Part A of the 2nd Schedule,—the result of which is that until Parliament legislates on this subject (no such law has so far been passed by Parliament till 1987), a Vice-President, while acting as or discharging the functions of the President, shall receive the same emoluments and privileges and allowances as the President gets under Art. 59(3). Since 1996, that emolument is a sum of Rs. 50,000/- per mensem.

   When the Vice-President does not act as President, his only function is that of the Chairman, Council of States, under Art. 97. By passing the Salaries and Allowances of Officers of Parliament (Amendment) Act, 1998, the salary of the Chairman of the Council of States has been raised to Rs. 40,000/- per mensem, *vide* Act 26 of 1998 (w.e.f. 1-1-1996). He is entitled to daily allowance as admissible to Members of Parliament.
9. *Ram Jawaya* v. *State of Punjab*, (1955) 2 S.C.R. 225 (*238-39*).
10. *Shamser Singh* v. *State of Punjab*, AIR 1974 S.C. 2192; *Rao* v. *Indira*, AIR 1971 S.C. 1002 (*1005*); *Sanjeevi* v *State of Madras*, AIR 1970 S.C. 1102 (*1106*).
11. DICEY, *Law of the Constitution*, 10th Ed., p. 468.
12. The Council of States, also called the upper House, is *not* subject to dissolution, but is a permanent body. One-third of its members retire every two years [*Art.* 83(1)].
13. The only instance of the exercise of the President's veto power over a Bill passed by Parliament, so far, has been in regard to the PEPSU Appropriation Bill. It was passed by Parliament under Art. 357, by virtue of the Proclamation under Art. 356. The

Proclamation was, however revoked on 7-3-1954, and the Bill was presented for assent of the President on 8-3-1954. The President withheld his assent to the Bill on the ground that on 8-3-1954, Parliament had no power to exercise the legislative powers of the PEPSU State and that, accordingly, the President could not give his assent to the Bill to enact a law which was beyond the competence of Parliament to enact on that date.

The Salary, Allowances and Pension of Members of Parliament (Amendment) Bill, 1991 was passed by the Houses of Parliament on the last day of its sitting, without obtaining the President's recommendation as required by Art. 117(1). It was presented to the President for his assent on 18th March, 1991. The President withheld his assent to it. (*Rajya Sabha, Parliamentary Bulletin Part I*, dated March 9, 1992).

This shows that the veto power is necessary to prevent the enactment of Bills which appear to be *ultra vires* or unconstitutional at the time when the Bill is ready for the President's assent. It also shows that there may be occasions when Government may have to advise the President to veto a Bill which had been introduced by the Government itself.

14. In 1986 both the Houses passed the Indian Post Office (Amendment) Bill, 1986. It was widely criticised as curtailing the Freedom of the Press. President Zail Singh did not declare his assent or that he withheld his assent. It was all the time in the 'pocket' of the President.

After the formation of the National Front Government in December, 1989, the President R. Venkataraman referred it back for reconsideration and the Prime Minister declared that it would be brought again before the Houses of Parliament, with suitable changes. It appears certain that it has been given up.

15. *Hoechst Pharmaceuticals* v. *State of Bihar*, AIR 1953 S.C. 1019 (para 89).

16. *Lakhinarayan* v. *Prov. of Bihar*, AIR 1950 F.C. 59; *State of Punjab* v. *Satya Pal*, AIR 1969 S.C. 903 (*912*).

The proposition arrived at in these cases now stand modified in a case from Bihar, decided by the Supreme Court in December, 1986—*Wadhwa* v. *State of Bihar*, AIR 1987 S.C. 579. In this case, it was established that the Government of Bihar, instead of laying before the State Legislature an Ordinance as required by Art. 213(2)(a) of the Constitution [corresponding to Art. 123(2)(a)] or having an Ordinance replaced by an Act of the Legislature, before the expiry of the Ordinance on the lapse of the time specified in the Constitution, would prolong its duration by re-promulgating it, *i.e.*, by issuing another new Ordinance to replace the Ordinance which would have otherwise expired. In this manner, some 256 Ordinances were kept alive (up to a length of 14 years in some cases) without getting an Act passed by the State Legislature in place of the expiring Ordinance. The Supreme Court held that the power of the Governor to promulgate an Ordinance was in the nature of an emergency power. Hence, though in some rare cases when an Act to replace an Ordinance could not be passed by the Legislature in time as it was loaded with other business; but if it was made a usual practice so as to establish legislation by the Executive (or an 'Ordinance Raj') instead of by the Legislature, as envisaged by the Constitution, that would amount to a *fraud* on the Constitution, on which ground, the Court would strike down the repromulgated Ordinance. The substance of this decision is, therefore, that in extreme cases, a Court may invalidate an Ordinance on the ground of *fraud* and it affirms the trend since *Cooper's* case (f.n. 18, *below*).

17. *Wadhawa* v. *State of Bihar*, AIR 1987 S.C. 579.

18. *Cooper* v. *Union of India*, AIR 1970 S.C. 564 (*588, 644*); *A.K. Roy* v. *Union of India*, AIR 1982 S.C. 710.

19. *Samsher* v. *State of Punjab*, AIR 1974 S.C. 2192 (para 30).

20. *Kehar Singh* v. *Union of India*, AIR 1989 S.C. 653.

21. *Maru Ram* v. *Union of India*, AIR 1980 S.C. 2147, paras 62, 72(a) [Const. Bench] **followed** in *S.R. Bommai* v. *Union of India*, (1994) 3 S.C.C. 1 (para 73)—9-Judge Bench.

22. As regards the Union Territories of (a) Goa, Daman & Diu, (b) Pondicherry, (c) Mizoram and (d) Arunachal Pradesh, the President's power to make regulations has ceased, since the setting up of a Legislature in each of these Territories, after the amendments of Art. 240(1), in 1962, 1971 and 1975. So far as Mizoram, Arunachal Pradesh and Goa are concerned, they have been promoted to the category of States, in 1986-87.

23. The words 'armed rebellion' have been substituted for 'internal disturbance', by the 44th Amendment Act, 1978.
24. For further study of the Cabinet system in India, see Author's *Commentary on the Constitution of India* (7th Ed.), Vol. E/1, pp, 195-293.
25. In July, 1989, their number was (a) Members of the Cabinet—18; (b) Ministers of State—40 (total 58). In July 1990 (a) the Members of the Cabinet—18; (b) Ministers of State—18; and (c) Deputy Ministers—5. In March 1992 the total was 57. In September, 1995—(a) Members of the Cabinet—20, and (b) Ministers of State—50. In December 1996 there were 20 cabinet ministers and 19 ministers of State. In November 2000 there were 29 Cabinet Ministers, 44 State Ministers and no Deputy Ministers. On 22.5.2008, there were 32 Cabinet Ministers, 8 Ministers of State (independent charge) and 40 other Ministers of State.
26. *Common Cause, A Registered Society* v. *Union of India,* (1999) 6 S.C.C. 667 (para 3) : A.I.R. 1999 S.C. 2979.
27. C.A.D., Vol. IV, pp. 580, 734; Vol. VII, pp. 32, 974, 984.
28. The suggestion of President Dr. Rajendra Prasad, in his speech at the Indian Law Institute, that the position of the Indian President was not identical with that of the British Crown, must be read with his quoted observation in the Constituent Assembly [X C.A.D. 988] which, as a contemporaneous statement, has a great value in assessing the intent of the makers of the Constitution, and the meaning behind Art. 74(1), as it stood up to 1976.
29. K.M. Munshi, the President under the Indian Constitution (1963), p. viii.
30. *Sanjeevi* v. *State of Madras*, AIR 1970 S.C.. 1102 (*1106*); *Rao* v. *Indira*, AIR 1971 S.C. 1002 (*1005*); *Shamser Singh* v. *State of Punjab*, AIR 1974 S.C. 2192.
31. BASU, *Commentary on the Constitution of India*, 5th Ed., Vol. II, p. 593, where it is stated—
    "Constitutional writers agree that a dismissal of the Cabinet by the Crown, would now be an unconstitutional act, except in the abnormal case of a Cabinet refusing to resign or to appeal to the electorate upon a vote of no confidence in the Commons." See the instances given in *Shamser Singh's* case [AIR 1974 S.C. 2192 (para 153)].
32. There was a vehement public criticism that this prohibition in Art. 148(4) was violated by the appointment of a retired Comptroller and Auditor-General as the Chairman of the Finance Commission. According to judicial decisions, an 'office' is an employment, which embraces the ideas of tenure, duration, emolument and duties. Now, the Finance Commission is an office created by Art. 280 of the Constitution itself, with a definite tenure, emoluments and duties as defined by the Finance Commission (Miscellaneous Provisions) Act, 1951, read with Art. 280 of the Constitution. Apparently, therefore, the membership of the Finance Commission is an office under the Government of India, which comes within the purview of Art. 148(4).
33. But, as Dr. Ambedkar pointed out in the Constituent Assembly (C.A.D., VIII, p. 407), in one respect the independence of the Comptroller and Auditor-General falls short of that of the Chief Justice of India. While the power of appointment of the staff of the Supreme Court has been given to the Chief Justice of India [*Art.* 146(1)], the Comptroller and Auditor-General has no power of appointment, and, consequently, no power of disciplinary control with respect to his subordinates. In the case of the Comptroller and Auditor-General, these powers have been retained by the Government of India though it is obviously derogatory to the administrative efficiency of this highly responsible functionary.
34. APPLEBY, A., *Re-examination of India's Administrative System,* p. 28.
35. Narhari Rao's statement before the Public Accounts Committee, 1952.

CHAPTER 12

THE UNION LEGISLATURE

Functions of Parliament.

AS has been explained at the outset, *our* Constitution has adopted the Parliamentary system of Government which effects a harmonious blending of the legislative and executive organs of the State inasmuch as the executive power is wielded by a group of members of the Legislature who command a majority in the popular Chamber of the Legislature and remain in power so long as they retain that majority. The functions of Parliament as the legislative organ follow from the above feature of the Parliamentary system:

I. *Providing the Cabinet.* It follows from the above that the first function of Parliament is that of providing the Cabinet and holding them responsible. Though the responsibility of the Cabinet is to the popular Chamber the membership of the Cabinet is not necessarily restricted to that Chamber and some of the members are usually taken from the upper Chamber.

II. *Control of the Cabinet.* It is a necessary corollary from the theory of ministerial responsibility that it is a business of the popular Chamber to see that the Cabinet remains in power so long as it retains the confidence of the majority in that House. This is expressly secured by Art. 75(3) of *our* Constitution.

III. *Criticism of the Cabinet* and *of individual Ministers.* In modern times both the executive and the legislative policies are initiated by the Cabinet, and the importance of the legislative function of Parliament has, to that extent, diminished from the historical point of view. But the critical function of Parliament has increased in importance and is bound to increase if Cabinet Government is to remain a 'responsible' form of Government instead of being an autocratic one. In this function, both the Houses participate and are capable of participating, though the power of bringing about a downfall of the Ministry belongs only to the popular Chamber (*i.e.*, the House of the People) [*Art.* 75(3)].

While the Cabinet is left to formulate the policy, the function of Parliament is to bring about a discussion and criticism of that policy on the floor of the House, so that not only the Cabinet can get the advice of the deliberative body and learn about its own errors and deficiencies, but the nation as a whole can be appraised of an alternative point of view, on the evaluation of which representative democracy rests in theory.

IV. *An organ of information.* As an organ of information, Parliament is more powerful than the Press or any other private agency, for Parliament secures the information *authoritatively*, from those in the know of things. The information is collected and disseminated not only through the debates but through the specific medium of 'Questions' to Ministers.

V. *Legislation.* The next function of the Legislature is that of making laws [*Arts.* 107-108; 245] which belongs to the Legislature equally under the Presidential and Parliamentary forms of government. In India, since the inauguration of the Constitution the volume of legislation is steadily rising in order to carry out the manifold development and other measures necessary to establish a welfare State.

VI. *Financial control.* Parliament has the sole power not only to authorise expenditure for the public services and to specify the purposes to which that money shall be appropriated, but also to provide the ways and means to raise the revenue required, by means of taxes and other impositions and also to ensure that the money that was granted has been spent for the authorised purposes. As under the English system, the lower House possesses the dominant power in this respect, under *our* Constitution [*Art.* 109].

Constitution of Parliament.

The Parliament of India consists of the President and two Houses. The lower House is called the House of the People while the upper House is known as the Council of States[1] [*Art.* 79].

(The *Hindi* names '*Lok Sabha*' and '*Rajya Sabha*' have been adopted by the House of the People and the Council of States respectively.)

The President is a part of the Legislature, like the English Crown, for, even though he does not sit in Parliament, except for the purpose of delivering his opening address [*Art.* 87], a *Bill passed by the Houses* of Parliament cannot become law without the President's assent. The other legislative functions of the President, such as the making of Ordinances while both Houses are not in sitting, have already been explained.

Composition of the Council of States.

The Council of States shall be composed of not more than 250 members, of whom (a) 12 shall be nominated by the President; and (b) the remainder (*i.e.*, 238) shall be representatives of the States and the Union Territories elected by the method of indirect election[2] [*Art.* 80].

(a) *Nomination.* The 12 nominated members shall be chosen by the President from amongst persons having 'special knowledge or practical experience in literature, science, art, and social service'. The Constitution thus adopts the principle of nomination for giving distinguished persons a place in the upper Chamber.

(b) *Representation of States.* The representatives of each State shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote.

(c) *Representation of Union Territories.* The representatives of the Union Territories shall be chosen in such manner as Parliament may prescribe [*Art.* 80(5)]. Under this power Parliament has prescribed[3] that the representatives of Union Territories to the Council of States shall be indirectly elected by members of an electoral college for that Territory, in accordance with the system of proportional representation by means of the single transferable vote.

The Council of States thus reflects a federal character by representing the Units of the federation. But it does not follow the American principle of equality of State representation in the Second Chamber. In India, the number of representatives of the States to the Council of States varies from 1 (Nagaland) to 31 (Uttar Pradesh).

Composition of the House of the People.

The House of the People has a variegated composition. The Constitution prescribes a maximum number as follows:

(a) Not more[3] than 530[4] [*Art.* 81(1)(a)] representatives of the States;

(b) Not more than 20 representatives of Union Territories [*Art.* 81(1)(b)].

(c) Not more than 2 members of the Anglo-Indian community, nominated by the President, if he is of opinion that the Anglo-Indian community is not adequately represented in the House of the People [*Art.* 331].

(i) The representatives of the States shall be directly elected by the people of the State on the basis of adult suffrage. Every citizen who is not less than 18[5] years of age and is not otherwise disqualified, *e.g.*, by reason of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to vote at such election [*Art.* 326].

There will be no reservation of seats for any minority community other than the Scheduled Castes and the Scheduled Tribes [*Arts.* 330, 341, 342].

The bulk of the members of the House are thus directly elected by the people.

(ii) The members from the Union Territories are to be chosen in such manner as Parliament may by law provide.

Under this power, Parliament has enacted[6] that representatives of all the Union Territories shall be chosen by direct election.

(iii) Two members may be nominated from the Anglo-Indian community by the President to the House of the People if he is of opinion that the Anglo-Indian community has not been adequately represented in the House of the People [*Art.* 331]. (see Table VIII, *post.*)

Territorial constituencies for election to the House of the People.

The election to the House of the People being direct, requires that the territory of India should be divided into suitable territorial constituencies, for the purpose of holding such elections. Article 81(2), as it stands after the Constitution (7th Amendment) Act, 1956, has provided for uniformity of representation in two respects—(a) as between the different States, and (b) as between the different constituencies in the same State, thus:

(a) there shall be allotted to each State a number of seats in the House of the People in such manner that the ratio between that number and the population of the State is, so far as practicable, the same for all States; and

(b) each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it is, so far as practicable, the same throughout the State.

Proportional Representation for Council of States.

While the system of separate electorates was abandoned by the Constitution, the system of proportional representation was partially adopted for the second Chamber in the Union and State Legislatures.

(a) As regards the Council of States, proportional representation by single transferable vote has been adopted for the indirect election by the elected members of the Legislative Assembly of each State, in order to give some representation to minority communities and parties [*Art.* 80(4)].

(b) Similarly, proportional representation is prescribed for election to the Legislative Council of a State by electorates consisting of municipalities, district boards and other local authorities and of graduates and teachers of three years standing resident in the State [*Art.* 171(4)].

As regards the House of the People [*Art.* 81] and the Legislative Assembly of a State, however, the system of proportional representation has been abandoned and, instead, the Constitution has adopted the single member constituency with reservation of seats (at the general election) for some backward communities, namely, the Scheduled Castes and Tribes [*Arts.* 330, 332].

The reasons for not adopting proportional representation for the House of the People were thus explained in the Constituent Assembly—

Why proportional representation not adopted for House of the People and Legislative Assembly.

(i) Proportional representation presupposes literacy on a large scale. It presupposes that every voter should be a literate, at least to the extent of being in a position to know the numerals and mark them on the ballot paper. Having regard to the position of literacy in this country at present, such a presumption would be extravagant.

(ii) Proportional representation is ill-suited to the Parliamentary system of government laid down by the Constitution. One of the disadvantages of the system of proportional representation is the fragmentation of the Legislature into a number of small groups. Although the British Parliament appointed a Royal Commission in 1910 to consider the advisability of introducing proportional representation and the Commission recommended it, Parliament did not eventually accept the recommendations of the Commission on the ground that the proportional representation would not permit a stable Government. Parliament would be so divided into small groups that every time anything happened which displeased certain groups in Parliament, they would on those occasions withdraw support to the Government with the result that the Government, losing the support of certain groups, would fall to pieces.

What India needed, at least in view of the existing circumstances, was a stable Government, and, therefore, proportional representation in the lower House to which the Government would be responsible could not be accepted. In this connection, Dr. Ambedkar said in the Constituent Assembly,—

> "I have not the least doubt in my mind, whether the future Government provides relief to the people or not, our future Government must do one thing—they must maintain a stable Government and maintain law and order."[7]

Duration of Houses of Parliament.

(a) The Council of States is not subject to dissolution. It is a permanent body, but (as nearly as possible) 1/3 of its members retire on the expiration of every second year, in accordance with provisions made by Parliament in this behalf. It follows that there will be an election of 1/3 of the membership of the Council of States at the beginning of every third year [*Art.* 83(1)]. The order of retirement of the members is governed by the Council of States (Term of Office of Members) Order, 1952, made by the President in exercise of powers conferred upon him by the Representation of the People Act, 1951.

(b) The normal life of the House of the People is 5 years,[8] but it may be dissolved earlier by the President.

On the other hand, the normal term may be extended by an Act passed by Parliament itself[9] during the period when a 'Proclamation of Emergency' (made by the President under Art. 352) remains in operation. The Constitution, however, sets a limit to the power of Parliament thus to extend its own life during a period of Emergency: the extension cannot be made for a period exceeding one year at a time (*i.e.*, by the same Act of Parliament), and, in any case, such extension cannot continue beyond a period of six months after the Proclamation of Emergency ceases to operate [Proviso to *Art.* 83].

Sessions of Parliament.

The President's power—(a) to summon either House, (b) to prorogue either House, and (c) to dissolve the House of the People has already been noted (in the Chapter—'The Union Executive', *ante*).

As regards summoning, the Constitution imposes a duty upon the President, namely, that he must summon each House at such intervals that six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session [*Art.* 85(1)]. The net result of this provision is that Parliament must meet at least twice a year and not more than six months shall elapse between the date on which a House is prorogued and the commencement of its next session.

Adjournment, prorogation and dissolution.

It would, in this context, be useful to distinguish prorogation and dissolution from adjournment. A 'session' is the period of time between the first meeting of a Parliament, and its prorogation or dissolution. The period between the prorogation of Parliament and its re-assembly in a new session is termed 'recess'.

Within a session, there are a number of daily 'sittings' separated by adjournments, which postpone the further consideration of business for a specified time—hours, days or weeks.

The sitting of a House may be terminated by (a) dissolution, (b) prorogation, or (c) adjournment:

(i) As stated already, only the House of the People is subject to dissolution. *Dissolution* may take place in either of two ways—(a) By efflux of time, *i.e.*, on the expiry of its term of five years, or the terms as extended during a Proclamation of Emergency. (b) By an exercise of the President's power under Art. 85(2).

(ii) While the powers of dissolution and prorogation are exercised by the President on the advice of his Council of Ministers, the power to adjourn the daily sittings of the House of the People and the Council of States belongs to the Speaker and the Chairman, respectively.

A *dissolution* brings the House of the People to an end (so that there must be a fresh election), while *prorogation* merely terminates a session. *Adjournment* does not put an end to the existence of a session of Parliament but merely postpones the further transaction of business for a specified time, hours, days or weeks.

(iii) A *dissolution* ends the very life of the existing House of the People so that *all matters* pending before the House lapse with the dissolution. If these matters have to be pursued, they must be re-introduced in the next House after fresh election. Such pending business includes not only notices, motions, etc., but Bills, including Bills which originated in the Council and were sent to the House, as well as Bills originating in the House and transmitted to the Council which were pending in the Council on the date of dissolution. But a Bill pending in the Council which has not yet been passed by the House shall not lapse on dissolution. A dissolution would not, however, affect a joint sitting of the two Houses summoned by the President to resolve a disagreement between the Houses if the President has notified his intention to hold a joint sitting before the dissolution [*Art.* 108(5)].

Though in *England* prorogation also wipes all business pending at the date of prorogation, in *India*, all Bills pending in Parliament are expressly saved by Art. 107(3). In the result, the only effect of a *prorogation* is that pending notices, motions and resolutions lapse, but Bills remain unaffected.

Adjournment has no such effect on pending business.

Qualifications for membership of Parliament.

In order to be chosen a member of Parliament, a person (a) must be a citizen of India; (b) must be not less than 30 years of age in the case of the Council of States and not less than 25 years of age in the case of the House of the People.

Disqualifications for membership.

Additional qualifications may be prescribed by Parliament by law [*Art.* 84]. A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

(a) if he holds any office of profit under the Government of India or the Government of any State (other than an office exempted by Parliament by law) but not a Minister for the Union or for a State; or

(b) if he is of unsound mind and stands so declared by a competent Court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India or has voluntarily acquired citizenship of a foreign State or is under acknowledgment of allegiance or adherence to a foreign power;

(e) if he is so disqualified by or under any law made by Parliament [*Art.* 102].

It may be noted that sex is no disqualification for membership of Parliament and that in the Thirteenth General Election, as many as 32 women secured election to the House of the People.

If any question arises as to whether a member of either House of Parliament has become subject to any of the above disqualifications, the President's decision, in accordance with the opinion of the Election Commission, shall be final [*Art.* 103].

A penalty of Rs. 500 per day may be imposed upon a person who sits or votes in either House of Parliament knowing that he is not qualified or that he is disqualified for membership thereof [*Art.* 104].

Vacation of seats by members.

A member of Parliament shall *vacate* his seat in the following cases [*Art.* 101]:

(i) *Dual membership.* (a) If a person be chosen to membership of both Houses of Parliament he must vacate his seat in one of the two Houses, as may be prescribed by Parliament by law. (b) Similarly, if a person is elected to the Union Parliament and a State Legislature then he must resign his seat in the State Legislature; otherwise his seat in Parliament shall fall vacant at the expiration of the period specified in the rules made by the President.

(ii) *Disqualification.* If a person incurs any of the disqualifications mentioned in Art. 102 (*e.g.*, becoming of unsound mind), his seat will thereupon become vacant immediately.

(iii) *Resignation.* A member may resign his seat by writing addressed to the Chairman of the Council of States or the Speaker of the House of the People, as the case may be, and thereupon his seat shall be vacant.

(iv) *Absence without permission.* The House may declare a seat vacant if the member in question absents himself from all meetings of the House for a period of 60 days without permission of the House.

Salaries and Allowances of Members of Parliament.

Under the Salaries, Allowances and Pension of Members of Parliament Act, 1954, as amended by Act 40 of 2006, a member of Parliament is entitled to a salary at the rate of Rs. 16,000 per mensem during the whole term of his office plus an allowance at the rate of Rs. 1000 for each day during any period of residence on duty at the place where

Parliament or any Committee thereof is sitting or where any other business connected with his duties as Member of Parliament is transacted. Together with this, he is entitled to travelling allowance, free transit by railways, steamer and other facilities as prescribed by rules framed under the Act. He shall also be entitled to a pension, since a 1976 amendment, on a graduated scale for each 5 year term as member of either House.

Officers of Parliament. Each House of Parliament has its own presiding officer and secretarial staff.

Speaker. There shall be a *Speaker* to preside over the House of the People. In general, his position is similar to that of the Speaker of the English House of Commons.

The House of the People will, as soon as may be after its first sitting, choose two members of the House to be, respectively, Speaker and Deputy Speaker [*Art.* 93]. The Speaker or the Deputy Speaker will normally hold office during the life of the House, but his office may terminate earlier in any of the following ways (i) By his ceasing to be a member of the House. (ii) By resignation in writing, addressed to the Deputy Speaker, and *vice versa.* (iii) By *removal* from office by a resolution, passed by a majority of all the then members of the House [*Art.* 94]. Such a resolution shall not be moved unless at least 14 days' notice has been given of the intention to move the resolution. While a resolution for his removal is under consideration, the Speaker shall not preside but he shall have the right to speak in, and to take part in the proceedings of, the House, and shall have a right of vote except in the case of equality of votes [*Art.* 96].

Powers of the Speaker. At other meetings of the House the Speaker shall preside. The Speaker will not vote in the first instance, but shall have and exercise a casting vote in the case of equality of votes. The absence of vote in the first instance will make the position of the Speaker as impartial as in England, and the casting vote is given to him only to resolve a deadlock.

The Speaker will have the final power to maintain order within the House of the People and to interpret its Rules of Procedure. In the absence of a quorum, it will be the duty of the Speaker to adjourn the House or to suspend the meeting until there is a quorum.

The Speaker's conduct in regulating the procedure or maintaining order in the House will not be subject to the jurisdiction of any Court [*Art.* 122].

Besides presiding over his own House, the Speaker possesses certain powers not belonging to the Chairman of the Council of States—

(a) The Speaker shall preside over a joint sitting of the two Houses of Parliament [*Art.* 118(4)].

(b) When a Money Bill is transmitted from the Lower House to the Upper House, the Speaker shall endorse on the Bill his certificate that it is a Money Bill [*Art.* 110(4)]. The decision of the Speaker as to whether a Bill is Money Bill is final and once the certificate is endorsed by the Speaker on a

Bill, the subsequent procedure in the passage of the Bill must be governed by the provisions relating to Money Bills.

Deputy Speaker.

While the office of Speaker is vacant or the Speaker is absent from a sitting of the House, the Deputy Speaker presides, except when a resolution for his *own* removal is under consideration.

Chairman.

While the House of the People has a Speaker elected by its members from among themselves, the Chairman of the Council of States (who presides over that House) performs that function *ex-officio*. It is the Vice-President of India who shall *ex-officio* be the Chairman of the Council of States and shall preside over that House and shall function as the Presiding Officer of that House so long as he does not officiate as the President of India during a casual vacancy in that office. When the Chairman acts as the President of India, the Office of the Chairman of the Council of States falls vacant and the duties of the office of the Chairman shall be performed by the Deputy Chairman. The Chairman may be removed from his office only if he is removed from the office of the Vice-President, the procedure for which has already been stated. Under the Salaries and Allowances of Officers of Parliament Act, 1953, as amended, the salary of the Chairman is the same as that of the Speaker, *viz.*, Rs. 40,000 plus a sumptuary allowance of Rs. 1,000 per mensem, but when the Vice-President acts as the President he shall be entitled to the emoluments and allowances of the President [*Art.* 65(3)] and during that period he shall cease to earn the salary of the Chairman of the Council of States. The functions of the Chairman in the Council of States are similar to those of the Speaker in the House of the People except that the Speaker has certain special powers according to the Constitution, for instance, of certifying a Money Bill, or presiding over a joint sitting of the two Houses, which have been already mentioned.

Privileges are certain rights belonging to each House of Parliament collectively and some others belonging to the members individually, without which it would be impossible for either House to maintain its independence of action or the dignity of its position.

Powers, Privileges and Immunities of Parliament and its Members.

Both the Houses of Parliament as well as of a State Legislature have similar *privileges* under *our* Constitution.

Clauses (1)-(2) of Arts. 105 and 194 of *our* Constitution deal only with two matters, *viz.*, freedom of speech and right of publication.

As regard privileges relating to *other* matters, the position, as it stands after the 44th Amendment, 1978, is as follows—The privileges of members of *our* Parliament were to be the same as those of members of the House of Commons (as they existed at the commencement of the Constitution), until *our* Parliament itself takes up legislation relating to privileges in whole or in part. In other words, if Parliament enacts any provision relating to any particular privilege at any time, the English precedents will to that extent be superseded in its application to *our* Parliament. No such legislation having been made by *our* Parliament, the privileges were the same as in the House of the Commons, subject to such exceptions as necessarily follow from the difference in the constitutional set-up in India. Reference to House of Commons was omitted in 1978.

In an earlier case,[10] the Supreme Court held that if there was any conflict between the existing privileges of Parliament and the fundamental rights of a citizen, the former shall prevail, for, the provisions in Arts. 105(3) and 194(3) of the Constitution, which confer upon the Houses of *our* Legislatures the same British privileges as those of the House of Commons, are independent provisions and are not to be construed as subject to Part III of the Constitution, guaranteeing the Fundamental Rights. For instance, if the House of a Legislature expunges a portion of its debates from its proceedings, or otherwise prohibits its publication, anybody who publishes such prohibited debate will be guilty of contempt of Parliament and punishable by the House and the Fundamental Right of freedom of expression [*Art.* 19(1)(a)] will be no defence. But in a later case,[11] the Supreme Court has held that though the existing privileges would not be fettered by Art. 19(1)(a), they must be read subject to Arts. 20-22 and 32.

Privileges classified.

The privileges of each House may be divided into two groups—(a) those which are enjoyed by the members individually, and (b) those which belong to each House of Parliament, as a collective body.

(A) The privileges enjoyed by the members individually are (i) Freedom from arrest; (ii) Exemption from attendance as jurors and witnesses; (iii) Freedom of speech.

(i) *Freedom from Arrest.* Section 135A of the C.P. Code, *as amended* by Act 104 of 1976, exempts a member from arrest during the continuance of a meeting of the Chamber or Committee thereof of which he is a member or of a joint sitting of the Chambers or Committees, and during a period of 40 days before and after such meeting or sitting. This immunity is, however, confined to arrest in civil cases and does not extend to arrest in criminal case or under the law of Preventive Detention.

(ii) *Freedom of Attendance as Witness.* According to the English practice, a member cannot be summoned, without the leave of the House, to give evidence as a witness while Parliament is in session.

(iii) *Freedom of Speech.* As in England, there will be freedom of speech within the walls of each House in the sense of immunity of action for anything said therein. While an ordinary citizen's right of speech is subject to the restrictions specified in Art. 19(2), such as the law relating to defamation, a Member of Parliament cannot be made liable in any court of law in respect of anything said in Parliament or any Committee thereof. But this does not mean unrestricted licence to speak anything that a member may like, regardless of the dignity of the House. The freedom of speech is therefore 'subject to the rules' framed by the House under its powers to regulate its internal procedure.

The Constitution itself imposes another limitation upon the freedom of speech in Parliament, namely, that no discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge [*Art.* 121].

(B) The privileges of the House *collectively* are—(i) The right to publish debates and proceedings and the right to restrain publication by others; (ii) The right to exclude others; (iii) The right to regulate the internal affairs of the House, and to decide matters arising within its walls; (iv) The right to publish Parliamentary misbehaviour; (v) The right to punish members and outsiders for breach of its privileges.

Thus, each House of Parliament shall have the power—

(i) To exclude strangers from the galleries at any time. Under the Rules of Procedure, the Speaker and the Chairman have the right to order the 'withdrawal of strangers from any part of the House'.

(ii) To regulate its internal affairs. Each House of Parliament has the right to control and regulate its proceedings and also to decide any matter arising within its walls, without interference from the Courts. What is said or done within the walls of Parliament cannot be inquired into in a Court of Law.

(iii) To punish members and outsiders for breach of its privileges. Each House can punish for contempt or breach of its privileges, and the punishment may take the form of admonition, reprimand or imprisonment. Thus, in the famous *Blitz case*, the Editor of the newspaper was called to the Bar of the House of the People and reprimanded for having published an article derogatory to the dignity of a member in his capacity as member of the House. In 1990, Sri K.K. Tewari, a former Minister was reprimanded by the Rajya Sabha. What constitutes breach of privileges or contempt of Parliament has been fairly settled by a number of precedents in England and India. Broadly speaking—

> "Any act or omission which obstructs or impedes either House of Parliament in the performance of its functions or which obstructs or impedes any member or officer of such House in the discharge of his duty or which has a tendency, directly or indirectly, to produce such results as may be treated as a contempt, even though there is no precedent of the offence."[12]

The different stages in the legislative procedure in Parliament relating to Bills *other than Money Bills* are as follows:

Legislative Procedure:
I. ***Ordinary Bills.***

1. *Introduction.* A Bill other than Money or financial Bills may be introduced in either House of Parliament [*Art.* 107(1)] and requires passage in both Houses before it can be presented for the President's assent. A Bill may be introduced either by a Minister or by a private Member. The difference in the two cases is that any Member other than a Minister desiring to introduce a Bill has to give notice of his intention and to ask for leave of the House to introduce which is, however, rarely opposed. If a Bill has been published in the official gazette before its introduction, no motion for leave to introduce the Bill is necessary. Unless published earlier, the Bill is published in the official gazette as soon as may be after it has been introduced.

2. *Motions after introduction.* After a Bill has been introduced or on some subsequent occasion, the Member in charge of the Bill may make one of the following motions in regards to the Bill, *viz.*—

(a) That it be taken into consideration.

(b) That it be referred to a Select Committee.

(c) That it be referred to a Joint Committee of the House with the concurrence of the other House.

(d) That it be circulated for the purpose of eliciting public opinion thereon.

On the day on which any of the aforesaid motions is made or on any subsequent date to which the discussion is postponed, the principles of the Bill and its general provisions may be discussed. Amendments to the Bill and clause by clause consideration of the provisions of the Bill take place when the motion that the Bill be taken into consideration is carried.

3. *Report by Select Committee.* It has already been stated that after introduction of the Bill the Member in charge or any other Member by way of an amendment may move that the Bill be referred to a Select Committee. When such a motion is carried, a Select Committee of the House considers the provisions of the Bill (but not the principles underlying the Bill which had, in fact, been accepted by the House when the Bill was referred to the Select Committee). After the Select Committee has considered the Bill, it submits its report to the House and after the report is received, a motion that the Bill as returned by the Select Committee be taken into consideration lies. When such a motion is carried, the clauses of the Bill are open to consideration and amendments are admissible.

4. *Passing of the Bill in the House where it was introduced.* When a motion that the Bill be taken into consideration has been carried and no amendment of the Bill has been made or after the amendments are over, the Member in charge may move that the Bill be passed. This stage may be compared to the third reading of a Bill in the House of Commons. After the motion that the Bill may be passed is carried,[13] the Bill is taken as passed so far as that House is concerned.

5. *Passage in the other House.* When a Bill is passed in one House, it is transmitted to the other House. When the Bill is received in the other House it undergoes all the stages as in the originating House subsequent to its introduction. The House which receives the Bill from another House can, therefore, take either of the following courses:

(i) It may reject the Bill altogether. In such a case the provisions of Art. 108(1)(a) as to joint sitting may be applied by the President.

(ii) It may pass the Bill with amendments. In this case, the Bill will be returned to the originating House. If the House which originated the Bill accepts the Bill as amended by the other House, it will be presented to the President for his assent [*Art.* 111]. If however the originating House does not agree to the amendments made by the other House and there is final disagreement as to the amendments between the two Houses, the President may summon a joint sitting to resolve the deadlock [*Art.* 108(1)(b)].

(iii) It may take no action on the Bill, *i.e.*, keep it lying on its Table. In such a case if more than six months elapse from the date of the reception of the Bill, the President may summon a joint sitting [*Art.* 108(1)(c)].

6. *President's Assent.* When a Bill has been passed by both Houses of Parliament either singly or at a joint sitting as provided in Art. 108, the Bill is presented to the President for his assent. If the President withholds his assent, there is an end to the Bill. If the President gives his assent, the Bill becomes an Act from the date of his assent. Instead of either refusing assent or giving assent, the President may return the Bill for reconsideration of the Houses with a message requesting them to reconsider it. If, however, the Houses pass the Bill again with or without amendments and the Bill is presented to the President for his assent after such reconsideration, the President shall have no power to withhold his assent from the Bill.

II. *Money Bills.* A Bill is deemed to be a 'Money Bill' if it contains only provisions dealing with all or any of the following matters:

(a) the imposition, abolition, remission, alteration or regulation of any tax; (b) the regulation of the borrowing of money by the Government; (c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into or the withdrawal of moneys from any such fund; (d) the appropriation of moneys out of the Consolidated Fund of India; (e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure; (f) the receipt of money on account of the Consolidated Fund of India or the public account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State; or (g) any matter incidental to any of the matters specified in sub-clauses (a) to (f) [*Art.* 110].

But a Bill shall not be deemed to be a Money Bill by reason only that it provides for imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

If any question arises whether a Bill is a Money Bill or not, the decision of the Speaker of the House of the People thereon shall be final. This means that the nature of a Bill which is certified by the Speaker as a Money Bill shall not be open to question either in a Court of law or in the either House or even by the President.

When a Bill is transmitted to the Council of States or is presented for the assent of the President, it shall bear the endorsement of the Speaker that it is a Money Bill. As pointed out earlier, this is one of the special powers of the Speaker.

The following is the procedure for the passing of Money Bills in Parliament:

A Money Bill shall not be introduced in the Council of States.

After a Money Bill has been passed by the House of the People, it shall be transmitted (with the Speaker's certificate that it is a Money Bill) to the Council of States for its recommendations. The Council of States cannot reject a Money Bill nor amend it by virtue of its own powers. It must, within a period of fourteen days from the date of receipt of the Bill, return the Bill to the House of the People which may thereupon either accept or reject all or any of the recommendations of the Council of States.

If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.

If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it is passed by the House of the People without any of the amendments recommended by the Council of States.

If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People [*Art.* 109].

Money Bill and Financial Bill.

Generally speaking, a Financial Bill may be said to be any Bill which relates to revenue or expenditure. But it is in a technical sense that the expression is used in the Constitution.

I. The definition of a 'Money Bill' is given in Art. 110 and no Bill is a Money Bill unless it satisfies the requirements of this Article. It lays down that a Bill is a Money Bill if it contains *only* provisions dealing with all or any of the six matters specified in that Article or matters incidental thereto. These six specified matters have already been stated [See under 'Money Bills', *ante*].

On the question whether any Bill comes under any of the sub-clauses of Art. 110, the decision of the Speaker of the House of the People is final and his certificate that a particular Bill is a Money Bill is not liable to be questioned. Shortly speaking, thus, only those Financial Bills are Money Bills which bear the certificate of the Speaker as such.

II. Financial Bills which do not receive the Speaker's certificate are of two classes. These are dealt with in Art. 117 of the Constitution—

(i) To the first class belongs a Bill which contains any of the matters specified in Art. 110 but does not consist *solely* of those matters, for example, a Bill which contains a taxation clause, but does not deal solely with taxation [*Art.* 117(1)].

(ii) Any ordinary Bill which contains provisions involving expenditure from the Consolidated Fund is a Financial Bill of the second class [*Art.* 117(3)].

III. The incidents of these three different classes of Bills are as follows—

(i) A Money Bill cannot be introduced in the Council of States nor can it be introduced except on the recommendation of the President. Again, the Council of States has no power to amend or reject such a Bill. It can only recommend amendments to the House of the People.

(ii) A Financial Bill of the first class, that is to say, a Bill which contains any of the matters specified in Art. 110 but does not exclusively deal with such matters, has two features in common with a Money Bill, *viz.*, that it cannot be introduced in the Council of States and also cannot be introduced except on the recommendation of the President. But not being a Money Bill, the Council of States has the same power to reject or amend such a Financial Bill as it has in the case of non-Financial Bills subject to the limitation that an amendment other than for reduction or abolition of a tax cannot be moved in either House without the President's recommendation. Such a Bill has to be passed in the Council of States through three readings like ordinary Bills and in case of a final disagreement between the two Houses over such a Bill, the provision for joint sitting in Art. 108 is attracted. Only Money Bills are excepted out of the provisions relating to a joint sitting [*Art.* 108(1)].

(iii) A Bill which merely involves expenditure and does not include any of the matters specified in Art. 110, is an ordinary Bill and may be initiated in either House and the Council of States has full power to reject or amend it. But it has only *one special incident* in view of the financial provision (*i.e.,* provision involving expenditure contained in it) *viz.*, that it must not be *passed* in either House unless the President has recommended the consideration of the Bill. In other words, the President's recommendation is not a condition precedent to its introduction as in the case of Money Bills and other Financial Bills of the first class but in this case it will be sufficient if the President's recommendation is received before the Bill is *considered.* Without such recommendation, however, the consideration of such Bill cannot take place [*Art.* 117(3)].

But for this special incident, a Bill which merely involves expenditure is governed by the same procedure as an ordinary Bill, including the provision of a joint sitting in case of disagreement between the two Houses.

Provisions for removing deadlock between two Houses of Parliament.

It has already been made clear that any Bill, *other than a Money Bill,* can become a law only if it is agreed to by both the Houses, with or without amendments. A machinery should then exist, for resolving a deadlock between the two Houses if they fail to agree either as to the provisions of the Bill as introduced or as to the amendments that may have been proposed by either House.

(A) As regards Money Bills, the question does *not* arise, since the House of the People has the final power of passing it, the other House having the power only to make recommendation for the acceptance of the House of the People. In case of disagreement over a Money Bill, thus, the lower House has the plenary power to override the wishes of the upper Houses, *i.e.*, the Council of States.

(B) As regards all other Bills (including 'Financial Bills'), the machinery provided by the Constitution for resolving a disagreement between the two Houses of Parliament is a joint sitting of the two Houses [*Art.* 108].

The President may notify to the Houses his intention to summon them for a joint sitting in case of disagreement arising between the two Houses in any of the following ways:—

If, after a Bill has been passed by one House and transmitted to the other Houses—

(a) the Bill is rejected by the other House; or

(b) the Houses have finally disagreed as to the amendments to be made in the Bill; or

(c) more than six months have elapsed from the date of the reception of the Bill by the other House without the Bill being passed by it.

No such notification can be made by the President if the Bill has already lapsed by the dissolution of the House of the People; but once the President has notified his intention to hold a joint sitting, the subsequent dissolution of the House of the People cannot stand in the way of the joint sitting being held.

Procedure at Joint sitting.

As stated earlier, the Speaker will preside at the joint sitting; in the absence of the Speaker, such person as is determined by the Rules of Procedure made by the President (in consultation with the Chairman of Council of States and the Speaker of the House of People) shall preside [*Art.* 118(4)]. The Rules, so made, provide that

> "During the absence of the Speaker from any joint sitting, the Deputy Speaker of the House or, if he is also absent, the Deputy Chairman of the Council or, if he is also absent, such other person as may be determined by the Members present at the sitting, shall preside."

There are restrictions on the amendments to the Bill which may be proposed at the joint sitting:

(a) If, after its passage in one House, the Bill has been rejected or has not been returned by the other House, only such amendments may be proposed at the joint sitting as are made necessary by the delay in the passage of the Bill.

(b) If the deadlock has been caused because the other House has proposed amendments to which the originating House cannot agree, then (i) amendments necessary owing to the delay in the passage of the Bill, as well as (ii) other amendments as are relevant to the matters with respect to which the House have disagreed, may be proposed at the joint sitting.

If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the *total number* of members of both Houses *present and voting*, it shall be deemed for the purposes of this Constitution to have been passed by both the Houses.

Joint sitting cannot be resorted to, for passing Constitution Amending Bill.

It is to be carefully noted that the procedure for joint sitting, as prescribed by Art. 108, is confined to Bills for ordinary legislation and does *not* extend to a Bill for amendment of the Constitution, which is governed by Art. 368(2), and must, therefore, be passed by each House, separately, by the special majority laid down. That is why the 43rd Amendment Bill, introduced in the *Lok Sabha* in April 1977, could not overcome the apprehended resistance in the *Rajya Sabha,* by resorting to a joint sitting, as carelessly suggested in some newspaper articles. The 45th Amendment Bill suffered mutilation in the *Rajya Sabha,* for the same reason.

Financial legislation in Parliament.

At the beginning of every financial year, the President shall, in respect of the financial year, cause to be laid before both the Houses of Parliament a statement of the estimated receipts and expenditure of the Government of India for that year. This is known as the "annual financial statement" (*i.e.*, the 'Budget') [*Art.* 112]. It also states the ways and means of meeting the estimated expenditure.

Policy Statement in the Budget.

In conformity with the usual Parliamentary practice in the United Kingdom, the Budget not only gives the estimates for the ensuing year but offers an opportunity to the Government to review and explain its financial and economic policy and programme to the Legislature to discuss and criticise it. The Annual Financial Statement in *our* Parliament thus contains, apart from the estimates of expenditure, the ways and means to raise the revenue,—

(a) An analysis of the actual receipts and expenditures of the closing year, and the causes of any surplus or deficit in relation to such year;

(b) An explanation of the economic policy and spending programme of the Government in the coming year and the prospects of revenue.

Votable and non-votable Expenditure.

The estimates of expenditure embodied in the annual financial statement shall show separately—(a) the sums required to meet expenditure described by this Constitution as expenditure *charged upon* the Consolidated Fund of India; and (b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of India.

(a) So much of the estimates as relates to expenditure charged upon the Consolidated Fund of India shall *not* be submitted to the vote of Parliament but each House is competent to discuss any of these estimates.

(b) So much of the estimates as relates to other expenditure shall be submitted in the form of demands for grants to the House of the People, and that House shall have power to assent, or to refuse to assent, to any demand, or to assent to any demand subject to a reduction of the amount specified therein. No demand for a grant shall however be made except on the recommendation of the President [*Art.* 113].

In practice, the presentation of the Annual Financial Statement is followed by a general discussion in both the Houses of Parliament. The estimates of expenditure, *other than those which are charged,* are then placed before the House of the People in the form of 'demands for grants'.

No money can be withdrawn from the Consolidated Fund except under an Appropriation Act, passed as follows:

As soon as may be after the demands for grants have been voted by the House of the People, there shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of India of all moneys required to meet—

(a) the grants so made by the House of the People; and (b) the expenditure charged on the Consolidated Fund of India.

This Bill will then be passed as a Money Bill, subject to this condition that no amendment shall be proposed to any such Bill in either House of Parliament which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund [*Art.* 114].

The following expenditure shall be expenditure charged on the Consolidated Fund of India [*Art.* 112(3)]—

Expenditure charged on the Consolidated Fund of India.

(a) the emoluments and allowances of the President and other expenditure relating to his office; (b) the salaries and allowances of the Chairman and the Deputy Chairman of the Council of States and the Speaker and the Deputy Speaker of the House of the People; (c) debt charges for which the Government of India is liable; (d) (i) the salaries, allowances and pensions payable to or in respect of Judges of the Supreme Court; (ii) the pensions payable to or in respect of Judges of the Federal Court; (iii) the pensions payable to or in respect of Judges of any High Court; (e) the salary, allowances and pension payable to or in respect of the Comptroller and Auditor-General of India; (f) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal; (g) any other expenditure declared by this Constitution or by Parliament by law to be so charged.

Relative parts played by the two Houses in financial legislation.

As has been already explained, financial business in Parliament starts with the presenting of the Annual Financial Statement. This Statement is caused to be laid by the President before *both* Houses of Parliament [*Art.* 112]. After the Annual Financial Statement is presented, there is a general discussion of the Statement as a whole in *either* House. This discussion is to be a general discussion relating to a policy involving a review and criticism of the administration and a valuation of the grievances of the people. No motion is moved at this stage nor is the Budget submitted to vote.

(b) The Council of States shall have *no further business* with the Annual Financial Statement beyond the above general discussion. The voting of the grants, that is, of the demands for expenditure made by Government, is an exclusive business of the House of the People. In the House of the People, after the general discussion is over, estimates are submitted in the form of demands for grants on the particular heads and it is followed by a vote of the House on each of the heads [*Art.* 113(2)].

(c) After the grants are voted by the House of the People, the grants so made by the House of the People as well as the expenditure charged on the Consolidated Fund of India are incorporated in an Appropriation Bill. It provides the legal authority for the withdrawal of these sums from the Consolidated Fund of India.

Similarly, the taxing proposals of the budget are embodied in another Bill known as the Annual Finance Bill.

Both these Bills being Money Bills, the special procedure relating to Money Bills shall have to be followed. It means that they can be introduced *only in the House of the People* and after each Bill is passed by the House of the People, it shall be transmitted to the Council of States which shall have the power only to make *recommendations* to the House of the People within a period of 14 days but no power of amending or rejecting the Bill. It shall lie at the hands of the House of the People to accept or reject the recommendations of the Council of States. In either case, the Bill will be deemed to be passed as soon as the House of the People decides whether it would accept or reject any of the recommendations of the Council of States and thereafter the Bill becomes law on receiving the assent of the President.

The financial system consists of two branches—revenue and expenditure.

Parliament's control over the Financial System.

(i) As regards revenue, it is expressly laid down by our Constitution [*Art.* 265] that no tax shall be levied or collected except by authority of law. The result is that the Executive cannot impose any tax without legislative sanction. If any tax is imposed without legislative authority, the aggrieved person can obtain his relief from the courts of law.

(ii) As regards expenditure, the pivot of parliamentary control is the Consolidated Fund of India. This is the reservoir into which all the revenues received by the Government of India as well as all loans raised by it are paid and the Constitution provides that no moneys shall be appropriated out of the Consolidated Fund of India except in accordance with law [*Art.* 266(3)]. This law means an Act of Appropriation passed in conformity with Art. 114. Whether the expenditure is charged on the Consolidated Fund of India or it is an amount voted by the House of the People, no money can be issued out of the Consolidated Fund of India unless the expenditure is authorised by an Appropriation Act [*Art.* 114(3)]. It follows, accordingly, that the executive cannot spend the public revenue without parliamentary sanction.

While an Act of Appropriation ensures that there cannot be any expenditure of the public revenues without the sanction of Parliament, Parliament's control over the expenditure cannot be complete unless it is able to ensure economy in the volume of expenditure. On this point, however, a reconciliation has to be made between two conflicting principles, namely, the need for parliamentary control and the responsibility of the Government in power for the administration and its policies.

Committee on Estimates.

The Government has the sole initiative in formulating its policies and in presenting its demands for carrying out those policies. Parliament can hardly refuse such demands or make drastic cuts in such demands without reflecting on the policy and responsibility of the Government in power. Nor is it expedient to suggest economies in different items of the expenditure proposed by the Government when the demands are presented to the House for its vote, in view of the shortage of time at its disposal. The scrutiny of the expenditure proposed by the Government is, therefore, made by the House in the informal atmosphere of a Committee, known as the Committee on Estimates. After the Annual Financial Statement is presented before the House of the People, this Committee of the House, annually constituted, examines the estimates, in order to:

(a) report to the House what economies, improvements, in organisation, efficiency or administrative reform, consistent with the policy underlying the estimates, may be effected;

(b) suggest alternative policies in order to bring efficiency and economy in administration;

(c) examine whether the money is well laid out within the limits of the policy implied in the estimates;

(d) suggest the form in which estimates are to be presented to Parliament.

Though the report of the Estimates Committee is not debated in the House, the fact that it carries on its examination throughout the year and places its views before the members of the House as a whole exerts a salutary influence in checking Governmental extravagance in making demands in the coming year, and in moulding its policies without friction in the House.

The third factor to be considered is the system of parliamentary control to ensure that the expenditure sanctioned by Parliament has actually been spent in terms of the law of Parliament, that is, the Appropriation Act or Acts. The office of the Comptroller and Auditor-General is the fundamental agency which helps Parliament in this work. The Comptroller and Auditor-General is the guardian of the public purse and it is his function to see that not a paisa is spent without the authority of Parliament. It is the business of the Comptroller and Auditor-General to audit the accounts of the Union and to satisfy himself that the expenditure incurred has been sanctioned by Parliament and that it has taken place in conformity with the rules sanctioned by Parliament. The Comptroller and Auditor-General then submits his report of audit relating to the accounts of the Union to the President who has to lay it before each House of Parliament.

Committee on Public Accounts.

After the report of the Comptroller and Auditor-General is laid before the Parliament, it is examined by the Public Accounts Committee. Though this is a Committee of the House of the People (having 15 members from that House) by an agreement between the two Houses, seven members of the Council of States are also associated with this Committee, in order to strengthen it. The Chairman of the Committee is generally a member of the Lok Sabha who is not a member of the ruling party.

In scrutinising the Appropriation Accounts of the Government of India and the report of the Comptroller and Auditor-General thereon it shall be the duty of the Committee on Public Accounts to satisfy itself—

(a) that the moneys shown in the accounts as having been disbursed were legally available for and applicable to the service or purpose to which they have applied or charged;

(b) that the expenditure conforms to the authority which governs it; and

(c) that every re-appropriation has been made in accordance with the provisions made in this behalf under rules framed by competent authority.

This Committee, in short, scrutinises the report of the Comptroller and Auditor-General in details and then submits its report to the House of the People so that the irregularities noticed by it may be discussed by Parliament and effective steps taken.

All moneys received by or on behalf of the Government of India will be credited to either of two funds—the Consolidated Fund of India, or the 'public account' of India. Thus,

Consolidated Fund of India.

(a) Subject to the assignment of certain taxes to the States, all *revenues* received by the Government of India, all *loans* raised by the Government and all moneys received by that Government in *repayment of loans* shall form one consolidated fund to be called "the Consolidated Fund of India" [*Art.* 266(1)].

Public Account of India.

(b) All other public moneys received by or on behalf of the Government of India shall be credited to the Public Account of India [*Art.* 266(2)], *e.g.*, moneys received by an officer or Court in connection with affairs of the Union [*Art.* 284].

No money out of the Consolidated Fund of India (or of a State) shall be appropriated except in accordance with a law of Appropriation. The procedure for the passing of an Appropriation Act has been already noted.

Contingency Fund of India.

(c) Art. 267 of the Constitution empowers Parliament and the Legislature of a State to create a 'Contingency Fund' for India or for a State, as the case may be. The 'Contingency Fund' for India has been constituted by the Contingency Fund of India Act, 1950. The Fund will be at the disposal of the executive to enable advances to be made, from time to time, for the purpose of meeting *unforeseen expenditure,* pending authorisation of such expenditure by the Legislature by supplementary, additional or excess grants. The amount of the Fund is subject to be regulated by the appropriate Legislature.

The custody of the Consolidated Fund of India and the Contingency Fund of India, the payment of moneys into such Funds, withdrawal of moneys therefrom, custody of public moneys other than those credited to such Funds, their payment into the public accounts of India and the withdrawal of moneys from such account and all other matters connected with or ancillary to matters aforesaid shall be regulated by law by Parliament, and, until provision in that behalf is so made shall be regulated by rules made by the President [*Art.* 283].

Constitutional position of the Council of States as compared with that of the House of the People.

Though *our* Council of States does not occupy as important a place in the constitutional system as the American Senate, its position is not so inferior as that of the House of Lords as it stands to-day. *Barring the specific provisions with respect to which the lower House has special functions, e.g.*, with respect to money Bills (see *below)*, the Constitution proceeds on a theory of equality of status of the two Houses.

This equality of status was explained by the Prime Minister Pandit Nehru himself,[14] in these words—

> "Under our Constitution Parliament consists of two Houses, each functioning in the allotted sphere laid down in the Constitution. We derive authority from that Constitution. Sometimes we refer back to the practice and conventions prevailing in the Houses of Parliament of the United Kingdom and even refer erroneously to an Upper House and a Lower House. I do not think that is correct. Nor is it helpful always to refer back to the procedure of the British Parliament which has grown up in the course of several hundred years and as a result of conflicts originally with the authority of the King and later between the Commons and the Lords. We have no such history behind us, though in making our Constitution we have profited by the experience of others.
>
> Our guide must, therefore, be our own Constitution which has clearly specified the functions of the Council of States and the House of the People. To call either of these Houses an Upper House or a Lower House is not correct. Each House has full authority to regulate its own procedure within the limits of the Constitution. Neither House by itself, constitutes Parliament. It is the two Houses together that are the Parliament of India ...That Constitution treats the two Houses equally, except in certain financial matters which are to be the sole purview of the House of the People. In regard to what these are, the Speaker is the final authority."

The Constitution also makes no distinction between the two Houses in the matter of selection of Ministers. In fact, during all these years, there have been several Cabinet Ministers from amongst the members of the Council of States, such as the Ministers for Home Affairs, Law, Railway and Transport, Production, Works, Housing and Supply, etc. But the responsibility of such member, as Minister, is to the House of the People [*Art.* 75(3)].

The exceptional provisions which impose limitations upon the powers of the Council of States, as compared with the House of the People are:

(1) A Money Bill shall not be introduced in the Council. Even a Bill having like financial provisions cannot be introduced in the Council.

(2) The Council has no power to reject or amend a Money Bill. The only power it has with respect to Money Bills is to suggest 'recommendations' which may or may not be accepted by the House of the People.

the Bill shall be deemed to have been passed by both Houses of Parliament, without the concurrence of the Council, if the Council does not return the Bill within 14 days of its receipt or makes recommendations which are not accepted by the House.

(3) The Speaker of the House has got the sole and final power deciding whether a Bill is a Money Bill.

(4) Though the Council has the power to discuss, it has no power to vote money for the public expenditure and demands for grants are not submitted for the vote of the Council.

(5) The Council of Ministers is responsible to the House of the People and not to the Council [*Art.* 75(3)].

(6) Apart from this, the Council suffers, by reason of its numerical minority, in case a joint session is summoned by the President to resolve a deadlock between the two Houses [*Art.* 108(4)].

On the other hand, the Council of States has certain special powers which the other House does not possess and this certainly adds to the prestige of the Council:

(a) Art. 249 provides for temporary Union legislation with respect to a matter in the State List, if it is necessary in the national interest, but in this matter a special role has been assigned by the Constitution to the Council. Parliament can assume such legislative power with respect to a State subject only if the Council of States declares, by a resolution supported by not less than two-thirds of its members present and voting, that it is necessary or expedient in the national interest that Parliament should make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force.

(b) Similarly, under Art. 312 of the Constitution, Parliament is empowered to make laws providing for the creation of one or more All-India Services common to the Union and the States, if the Council of States has declared by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do.

In both the above matters, the Constitution assigns a special position to the Council because of its federal character and of the fact that a resolution passed by two-thirds of its members would virtually signify the consent of the States.

Notwithstanding these special functions and the theory of equality propounded by Pandit Nehru, it is not possible for the Council of States, by reason of its very composition, to attain a status of equality with the House of the People. Even though there is no provision in the Constitution corresponding to Art. 169 relating to the upper Chamber in the States, for the abolition of the upper Chamber in Parliament, there has been, since the inauguration of the Constitution, a feeling in the House of the People that the Council serves no useful purpose and is nothing but a 'device to flout the voice of the People'[14] which led even to the motion of a Private Member's Resolution for the abolition of the Council. It was stayed for the time being only at the intervention of the then Prime Minister Pandit Nehru on the ground that the working of the Council was yet too short to adjudge its usefulness.[14]

(c) The most extreme instance of its importance, during its career, has recently been shown by the Council of States in the matter of constitutional amendment. Under Art. 368(2), a Bill for the amendment of the Constitution, in order to be law, must be passed in *each* House of Parliament by the specified special majority, and the device of joint sitting under Art. 108 is *not* available to remove the opposition by the *Rajya Sabha* in respect of a Bill for amendment of the Constitution. While the Janata Party had an overwhelming majority in the *Lok Sabha,* the Congres [(O) and (I) together] had an imposing majority in the *Rajya Sabha* so that there was no chance of the 43rd Amendment Bill, 1977, being passed by a two-thirds majority in the *Rajya Sabha,* as its composition existed in April, 1977. The progress of the 43rd Amendment Bill had, therefore, to be halted after its introduction in the *Lok Sabha,* since the Congress Party declared its intention to oppose the consideration of this Bill. The opposition of the two Congress Parties also truncated the 45th Constitution Amendment Bill, while in the *Rajya Sabha.*

The Constitution (64th Amendment) Bill, 1989 and the Constitution (65th Amendment) Bill, 1989 could not secure the requisite majority in the *Rajya Sabha* and hence could not be passed (13-10-1989), even though they had earlier been duly passed by the *Lok Sabha.*

REFERENCES

1. The first general election under the Constitution took place in the winter of 1951-52. The first Lok Sabha, which held its first sitting on 13-5-1952 was dissolved by the President on 4-4-1957.

   The second general election was held in the winter of 1956-57, and the second Lok Sabha held its first sitting on 10-5-1957.

   The third general election was held in February, 1962, and the third Lok Sabha had its first sitting on 16-4-1962.

   The fourth general election was held in February, 1967, and the fourth Lok Sabha had its first sitting on 16-3-1967 and was prematurely dissolved on 27-12-1970.

   The fifth general election, which was thus a mid-term election, was held in March, 1971, and the fifth Lok Sabha had its first sitting on March 19, 1971.

   The sixth general election was held in March 1977, after the dissolution of the Lok Sabha on 18th January, 1977, during its second extended term. Excepting in Kerala, there was no simultaneous election to the Legislative Assemblies of the States. The sixth Lok Sabha had its first sitting on 25-3-1977.

   The seventh general election was held in January, 1980 and the first sitting was on 21-1-1980.

   The eighth general election was held in December, 1984 and the first sitting was on 15-1-1985.

   The ninth general election was held in November, 1989 and the ninth Lok Sabha had its first sitting on 18th December 1989.

   The tenth general election was held on 20th May, 12th and 15th June, 1991 and the tenth Lok Sabha had its first sitting on 20-6-1991.

   The eleventh general election was held in May 1996 and the Eleventh Lok Sabha had its first sitting on 22-5-1996.

   The twelfth general election was held in February, 1998 and the twelfth Lok Sabha had its first sitting on 23-3-1998.

   The thirteenth general election was held in September and October, 1999 and the thirteenth Lok Sabha had its first sitting on 20-10-1999.

The fourteenth general election was held in April and May, 2004 and the fourteenth Lok Sabha had its first sitting on 02-06-2004.

The Rajya Sabha was first constituted on 3-4-1952 and it held its first sitting on 13-5-1952, and the retirement of the first batch of the members of the Rajya Sabha took place on 2-4-1954.

2. Sections 27A, 27H of Representation of the People Act, 1950.
3. The actual number of members of the two Houses now is given in Table VIII.
4. As amended by the Constitution (31st Amendment) Act, 1973, and by the Goa, Daman and Diu Reorganisation Act, 1987 w.e.f. 30-5-1987.
5. As amended by the Constitution (61st Amendment) Act, 1988.
6. The Union Territories (Direct Election to the House of the People) Act, 1965.
7. VII C.A.D. 1262.
8. By the 42nd Amendment Act, 1976, the Indira Government, extended this term to 6 years but it has been restored to 5 years, by the 44th Amendment Act, 1978.
9. This power was used during the Emergency on the ground of internal disturbance (1975-77).
10. *Sharma* v. *Shri Krishna*, AIR 1959 S.C. 395.
11. Ref. under Art. 143, AIR 1965 S.C. 745 (*764, 767*).
12. May, *Parliamentary Practice*, 15th Ed., p. 109.
13. Except in the case of Bills for the amendment of the Constitution (*Art.* 368), all Bills and other questions before each House are passed or carried by a simple majority [*Art.* 100(1)].
14. Statement in the Rajya Sabha, dated 6-5-1953. Similar views were reiterated in the other House (H.P. Deb, 12-5-1953).

PART III

Government of the States

CHAPTER 13

THE STATE EXECUTIVE

1. The General Structure.

As stated at the outset, *our* Constitution provides for a federal Government, having separate systems of administration for the Union and its Units, namely, the States. The Constitution contains provisions for the governance of both. It lays down a uniform structure for the State Government, in Part VI of the Constitution, which is applicable to all the States, save the State of Jammu & Kashmir which has a separate Constitution for its State Government, for reasons which will be explained in Chap. 15.

Broadly speaking the pattern of Government in the States is the same as that for the Union, namely, a parliamentary system,—the executive head being a constitutional ruler who is to act according to the advice of Ministers responsible to the State Legislature (or its popular House, where there are two Houses),—except in matters in respect of which the Governor of a State is empowered by the Constitution to act 'in his discretion' [*Art.* 163(1)].

2. The Governor.

Governor.

At the head of the executive power of a State is the Governor just as the President stands at the head of the executive power of the Union. The executive power of the State is vested in the Governor and all executive action of the State has to be taken in the name of the Governor. Normally, there shall be a Governor for each State, but an amendment of 1956 makes it possible to appoint the same person as the Governor for the two or more States [*Art.* 153].

Appointment and term of Office of Governor.

The Governor of a State is not elected but is appointed by the President and holds his office at the pleasure of the President. Any citizen of India who has completed 35 years of age is eligible for the office, but he must not hold any other office of profit, nor be a member of the Legislature of the Union or of any State [*Art.* 158]. There is no bar to the selection of a Governor from amongst members of a Legislature but if a Member of a Legislature is appointed Governor, he ceases to be a Member immediately upon such appointment.

The normal term of a Governor's office shall be five years, but it may be terminated earlier, by—

(i) Dismissal by the President, at whose 'pleasure' he holds the office [*Art.* 156(1)]; (ii) Resignation [*Art.* 156(2)].

The grounds upon which a Governor may be removed by the President are not laid down in the Constitution, but it is obvious that this power will be sparingly used to meet with cases of gross delinquency, such as bribery, corruption, treason, and the like or violation of the Constitution.[1]

There is no bar to a person being appointed Governor more than once.[2]

Why an appointed Governor.

The original plan in the Draft Constitution was to have elected Governors. But in the Constituent Assembly, it was replaced by the method of appointment by the President, upon the following arguments[3]:

(a) It would save the country from the evil consequences of still another election, run on personal issues. To sink every province into the vortex of an election with millions of primary voters but with no possible issue other than personal, would be highly detrimental to the country's progress.

(b) If the Governor were to be elected by direct vote, then he might consider himself to be superior to the Chief Minister, who was merely returned from a single constituency, and this might lead to frequent *friction* between the Governor and the Chief Minister.

But under the Parliamentary system of Government prescribed by the Constitution, the Governor was to be constitutional head of the State,—the real executive power being vested in the Ministry responsible to the Legislature.

> "When the whole of the executive power is vested in the Council of Ministers, if there is another person who believes that he has got the backing of the province behind him, and, therefore, at his discretion he can come forward and intervene in the governance of the province, it would really amount to a surrender of democracy."[3]

(c) The expenses involved and the elaborate machinery of election would be out of proportion to the powers vested in this Governor who was to act as a mere constitutional head.

(d) A Governor elected by adult franchise to be at the top of the political life in the State would soon prefer to be the Chief Minister or a Minister with effective powers. The party in power during the election would naturally put up for Governorship a person who was not as outstanding as the future Chief Minister with the result that the State would not be able to get the best man of the party. All the process of election would have to be gone through only to get a second rate man of the party elected as Governor. Being subsidiary in importance to the Chief Minister, he would be the nominee of the Chief Minister of the State, which was not a desirable thing.

(e) Through the procedure of appointment by the President, the Union Government would be able to maintain intact its control over the States.

(f) The method of election would encourage separatist tendencies. The Governor would then be the nominee of the Government of that particular province to stand for the Governorship. The stability and unity of the Governmental machinery of the country as a whole could be achieved only by adopting the system of nomination.

> "He should be a more detached figure acceptable to the province, otherwise he could not function, and yet may not be a part of the party machine of the province. On the whole it would probably be desirable to have people from outside, eminent in something, education or other fields of life who would naturally co-operate fully with the Government in carrying out the policy of the Government and yet represent before the public something above politics.[3]

The arguments which were advanced, in the Constituent Assembly, *against* nomination are also worthy of consideration:

(i) A nominated Governor would not be able to work for the welfare of a State because he would be a foreigner to that State and would not be able to understand its special needs.

(ii) There was a chance of friction between the Governor and the Chief Minister of the State no less under the system of nomination, if the Premier of the State did not belong to the same party as the nominated Governor.[4]

(iii) The argument that the system of election would not be compatible with the Parliamentary or Cabinet system of Government is not strong enough in view of the fact that even at the Centre there is an elected President to be advised by a Council of Ministers. Of course, the election of the President is not direct but indirect.

(iv) An appointed Governor under the instruction of the Centre might like to run the administration in a certain way contrary to the wishes of the Cabinet. In this tussle, the Cabinet would prevail and the President-appointed Governor would have to be recalled. The system of election, therefore, was far more compatible with good, better and efficient Government plus the right of self-Government.

(v) The method of appointment of the head of the State executive by the federal executive is repugnant to the strict federal system as it obtains in the *U.S.A.* and *Australia*.

Status of appointed Governor so far.

In actual working, it may be said that in States where one party has a clear majority, the part played by the Governor has been that of a constitutional and impartial head, but in those States where there are multiple parties with an uncertain command over the Legislature, the Governor has acted as a mere agent of the Centre in various matters, such as inviting a person to form a Ministry, because he belonged to the ruling party at the Centre, even though he had no clear following (as in the case of Sri Rajagopalachari in Madras, after the General election in 1952) or bringing about the removal of a Ministry having the confidence of the Legislature, by means of a report under Art. 356(as happened in Kerala in 1959, in the case of the Communist Ministry headed by Sri Namboodiripad). Nevertheless, there is one aspect in which the system of appointing an outsider by the Centre has proved to be beneficial, and that is the prevention of disruptive and separatist forces from impairing the national unity and strength as might otherwise have been possible without the knowledge of the Centre, under a locally elected Governor.

It is from this standpoint alone that one can tolerate the patently undemocratic instances of appointing a retiring or a retired member of the Indian Civil Service or the Indian Administrative Service (who is obviously a central bureaucrat) or of the Armed Forces as a Governor.

Conditions of Governor's office.

A Governor gets a monthly emolument of Rs. 36,000[5], together with the use of an official residence free of rent and also such allowances and privileges as are specified in the Governor's (Emoluments, Allowances and Privileges) Act, 1982 as amended in 1998 (w.e.f. 1-1-1996). The emolument and allowances of a Governor shall not be diminished during his term of office [*Art.* 158(3)-(4)].

Powers of the Governor.

The Governor has no diplomatic or military powers like the President, but he possesses executive, legislative and judicial powers analogous to those of the President.

I. *Executive.* Apart from the power to appoint his Council of Ministers, the Governor has the power to appoint the Advocate-General and the Members of the State Public Service Commission. The Ministers as well as Advocate-General hold office during the pleasure of the Governor, but the Members of the State Public Service Commission cannot be removed by him, they can be removed only by the President on the report of the Supreme Court on reference made by the President and, in some cases, on the happening of certain disqualifications [*Art.* 317].

The Governor has no power to appoint Judges of the State High Court but he is entitled to be consulted by the President in the matter [*Art.* 217(1)].

Like the President, the Governor has the power to nominate members of the Anglo-Indian community to the Legislative Assembly of his State, if he is satisfied that they are not adequately represented in the Assembly; but while the President's corresponding power with regard to the House of the People is limited to a maximum of two members, in the case of the Governor the limit is one member only, since the Constitution (23rd Amendment) Act, 1969 [*Art.* 333].

As regards the upper Chamber of the State Legislature (in States where the Legislature is bi-cameral), namely, the Legislative Council, the Governor has a power of nomination of members corresponding to the power of the President in relation to the Council of States, and the power is similarly exercisable in respect of "persons having special knowledge or practical experience in respect of matters such as literature, science, art, co-operative movement and social service" [*Art.* 171(5)]. It is to be noted that 'co-operative movement' is not included in the corresponding list relating to the Council of States. The Governor can so nominate 1/6 part of the total members of the Legislative Council.

II. *Legislative.* As regards *legislative* powers, the Governor is a part of the State Legislature [*Art.* 164] just as the President is a part of Parliament. Again, he has a right of addressing and sending messages, and summoning, proroguing and dissolving, in relation to the State Legislature, just as the President has in relation to Parliament.[6] He also possesses a similar power of causing to be laid before the State Legislature the annual financial statement [*Art.* 202] and of making demands for grants and recommending 'Money Bills' [*Art.* 207].

His powers of 'veto' over State legislation and of making Ordinances are dealt with separately. (See Chap. 14 "Governor's power of veto" and "Ordinance-making power of Governor".)

III. *Judicial.* The Governor has the power to grant pardons, reprieves, respites, or remission of punishments or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which executive power of the State extends [*Art.* 161]. He is also consulted by the President in the appointment of the Chief Justice and the Judges of the High Court of the State.

IV. *Emergency Power.* The Governor has no emergency powers[7] to meet the situation arising from external aggression or *armed rebellion* as the President has [*Art.* 352(1)], but he has the power to make a report to the President whenever he is satisfied that a situation has arisen in which Government of the State cannot be carried on in accordance with the provisions of the Constitution [*Art.* 356], thereby inviting the President to assume to himself the functions of the Government of the State or any of them. [This is popularly known as 'President's Rule'.]

3. The Council of Ministers.

As has already been stated, the Governor is a constitutional head of the State executive, and has, therefore (subject to his discretionary functions noted below), to act on the advice of a Council of Ministers [*Art.* 163]. The provisions relating to the Council of Ministers of the Governor are, therefore, subject to exceptions to be stated presently, similar to those relating to the Council of Ministers of the President.

Appointment of Council of Ministers.

At the head of a State Council of Ministers is the *Chief* Minister (corresponding to the *Prime* Minister of the Union). The Chief Minister is appointed by the Governor,[8] while the other Ministers are appointed by the Governor on the advice of the Chief Minister. The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State and individually responsible to the Governor. The Ministers are jointly and severally responsible to the Legislature. He/They is/are publicly accountable for the acts or conducts in the performance of duties.[9] Any person[10] may be appointed a Minister (provided he has the confidence of the Legislative Assembly), but he ceases to be a Minister if he is not or does not remain, for a period of six consecutive months, a member of the State Legislature. The salaries and allowances of Ministers are governed by laws made by the State Legislature [*Art.* 164].

Relationship between the Governor and his Ministers.

It may be said that, in general, the relation between the Governor and his ministers is similar to that between the President and his ministers, with this important difference that while the Constitution does not empower the President to exercise any function 'in his discretion', it authorises the Governor to exercise some functions 'on his discretion'. In this respect, the principle of Cabinet responsibility in the States differs from that in the Union.

Article 163(1) says—

> "There shall be a Council of Ministers.... to aid and advise the Governor in the exercise of his functions, *except* in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion."

It is because of this discretionary jurisdiction of the Governor that no amendment was made by the 42nd Amendment Act in Art. 163(1) as in Art. 74(1), which we have noticed in Chap. 11.

In the exercise of the functions which the Governor is empowered to exercise in his discretion, he will *not* be required to act according to the advice of his ministers or even to seek such advice. Again, if any question arises whether any matter is or is not a matter as regards which the Governor is required by the Constitution to act in his discretion, the decision of the Governor shall be final, and the validity of anything done by the Governor shall not be called into question on the ground that he ought or ought not to have acted in his discretion [*Art.* 163(2)].

A. The functions which are specially required by the Constitution to be exercised by the Governor in his discretion are—

Discretionary functions of Governor

(a) Para 9(2) of the 6th Sch. which provides that the Governor of Assam shall, in his discretion, determine the amount payable by the State of Assam to the District Council, as royalty accruing from licences for minerals.[11]

(b) Art. 239(2) [added by the Constitution (7th Amendment) Act, 1956] which authorises the President to appoint the Governor of a State as the administrator of an adjoining Union Territory and provides that where a Governor is so appointed, he shall exercise his functions as such administrator 'independently of his Council of Ministers'.

Special Responsibilities.

B. Besides the above functions to be exercised by the Governor 'in his discretion', there are certain functions under the amended Constitution which are to be exercised by the Governor 'on his special responsibility',—which practically means the same thing as 'in his discretion', because though in cases of special responsibility, he is to *consult* his Council of Ministers, the final decision shall be 'in his individual judgment', which no court can question. Such functions are—

(i) Under Art. 371(2), as amended,[12] the President may direct that the Governor of Maharashtra or Gujarat shall have a special responsibility for taking steps for the development of certain areas in the State, such as Vidarbha, Saurashtra.

(ii) The Governor of Nagaland shall, under Art. 371A(1)(b) (introduced in 1962), have similar responsibility with respect to law and order in that State so long as internal disturbances caused by the hostile Nagas in that State continue.

(iii) Similarly, Art. 371C(1), as inserted in 1971, empowers the President to direct that the Governor of Manipur shall have special responsibility to secure the proper functioning of the Committee of the Legislative Assembly of the State consisting of the members elected from the Hill Areas of that State.

(iv) Art. 371F(g), inserted by the Constitution (36th Amendment) Act, 1975, similarly, imposes a special responsibility upon the Governor of Sikkim "for peace and for an equitable arrangement for ensuring the social and economic advancement of different sections of the population of Sikkim".

In the discharge of such special responsibility, the Governor has to act according to the directions issued by the President from time to time, and subject thereto, he is to act 'in his discretion'.

Discretion, ***in practice,*** **in certain matters.**

C. In view of the responsibility of the Governor to the President and of the fact that the Governor's decision as to whether he should act in his discretion in any particular matter is final [*Art.* 163(2)], it would be possible for a Governor to act without ministerial advice in certain *other* matters, according to the circumstances, even though they are not specifically mentioned in the Constitution as discretionary functions.[13]

(i) As an instance to the point may be mentioned the making of a report to the President under Art. 356, that a situation has arisen in which the Government of State cannot be carried on in accordance with the provisions of the Constitution. Such a report may possibly be made against a Ministry in power,—for instance, if it attempts to misuse its powers to subvert the Constitution. It is obvious that in such a case the report cannot be made according to ministerial advice. No such advice, again, will be available where one Ministry has resigned and another alternative Ministry cannot be formed. The making of a report under Art. 356, thus, must be regarded as a function to be exercised by the Governor in the exercise of his discretion.

Obviously, the Governor is also the medium through whom the Union keeps itself informed as to whether the State is complying with the Directives issued by the Union from time to time.

(ii) Further, after such a Proclamation as to failure of the Constitution machinery in the State is made by the President, the Governor acts as the agent of the President as regards those functions of the State Government which have been assumed by the President under the Proclamation [*Art.* 356(1)(a)].

(iii) In some other matters, such as the reservation of a Bill for consideration of the President [Art. 200], the Governor may not always be in agreement with his Council of Ministers, particularly when the Governor happens to belong to a party other than that of the Ministry. In such cases, the Governor may, in particular situations, be justified in acting without ministerial advice, if he considers that the Bill in question would affect the powers of the Union or contravene any of the provisions of the Constitution even though his Ministry may be of a different opinion.[14-15]

President's control over the Governor.

It is obvious that as regards matters on which the Governor is empowered to act in his discretion or on his 'special responsibility', the Governor will be under the complete control of the President.

As regards other matters, however, though the President will have a personal control over the Governor through his power of appointment and removal,[16] it does not seem that the President will be entitled to exercise any effective control over the State Government against the wishes of a Chief Minister who enjoys the confidence of the State Legislature, though, of course, the President may keep himself informed of the affairs in the State through the reports of the Governor, which may even lead to the removal of the Ministry, under Art. 356, as stated above.

Whether Governor competent to dismiss a Chief Minister.

A sharp controversy has of late arisen upon the question whether a Governor has the power to dismiss a Council of Ministers, headed by the Chief Minister, on the *assumption* that the Chief Minister and his

Cabinet have lost their majority in the popular House of the Legislature. The controversy has been particularly intriguing inasmuch as two Governors acted in contrary directions under similar circumstances. In West Bengal, in 1967, Governor Dharma Vira, being of the view that the United Front Ministry, led be Ajoy Mukherjee, had lost majority in the Legislative Assembly, owing to defections from that Party, asked the Chief Minister to call a meeting of Assembly at a short notice, and, on the latter's refusal to do so, dismissed the Chief Minister with his Ministry. On the other hand, in Uttar Pradesh in 1970, Governor Gopala Reddy dismissed Chief Minister Charan Singh, on a similar assumption, without even waiting for the verdict of the Assembly which was scheduled to meet only a few days later. Quite a novel thing happened in Uttar Pradesh in 1998 when the Governor Romesh Bhandari, being of the view that the Chief Minister Kalyan Singh Ministry had lost majority in the Assembly, dismissed him without affording him opportunity to prove his majority on the floor of the House and appointed Shri Jagdambika Pal as the Chief Minister which was challenged by Shri Kalyan Singh before the High Court which by an interim order put Shri Kalyan Singh again in position as the Chief Minister. This order was challenged by Shri Jagdambika Pal before the Supreme Court which directed a "composite floor test" to be held between the contending parties which resulted in Shri Kalyan Singh securing majority. Accordingly, the impugned interim order of the High Court was made absolute.[17]

Before answering the question with reference to the preceding instances, it should be noted that the Cabinet system of Government has been adopted in *our* Constitution from the United Kingdom and some of the salient conventions underlying the British system have been codified in our Constitution. In the absence of anything to the contrary in the context, therefore, it must be concluded that the position under our Constitution is the same as in the United Kingdom.

In *England,* the Ministers being legally the servants of the Crown, at law the Crown has the power to dismiss each Minister, individually or collectively. But upon the growth of the Parliamentary system, it has been established that the Ministers, *collectively*, hold their office so long as they command a majority in the House of Commons. This is known as the 'collective responsibility' of Ministers. The legal responsibility of the Ministers, as a collective body, to the Crown has thus been replaced by the *political* responsibility of the Ministry to Parliament, and the Crown's power to dismiss a Prime Minister of his Cabinet has become obsolete,—the last instance being 1783.[18] The Crown retains, however, his power to dismiss a Minister individually and, in practice, this power is exercised by the Crown on the advice of the Prime Minister himself, when he seeks to weed out an undesirable colleague.

Be that as it may, the above two propositions as they exist today in England have been codified in Cls. (1) and (2) of Art. 164 of our Constitution as follows :

> "(1) ... *and the* Ministers *shall hold office at the pleasure of the Governor;*
>
> (2) *The* Council *of Ministers shall be* collectively *responsible to the Legislative Assembly of the State.*"

In the above context, the legitimate conclusion that can be drawn is that—

(a) The Governor has the power to dismiss an individual Minister at any time.

Testing majority support.

(b) He can dismiss a Council of Ministers or the Chief Minister (whose dismissal means a fall of the Council of Ministers), *only* when the Legislative Assembly has *expressed* its want of confidence in the Council of Ministers, either by a direct vote of no-confidence or censure or by defeating an important measure or the like, and the Governor does not think fit to dissolve the Assembly. The Governor cannot do so at his pleasure on his *subjective estimate* of the strength of the Chief Minister in the Assembly at any point of time, because it is for the Legislative Assembly to enforce the collective responsibility of the Council of Ministers to itself, under Art. 164(2).

The above view of the Author has been upheld by the Supreme Court in *S.R. Bommai* v. *Union of India*,[19] (a 9-Judge Bench) by observing that wherever a doubt arises whether a Ministry has lost the confidence of the House, the only way of testing is on the floor of the House.[20] The assessment of the strength of the Ministry is not a matter of private opinion of any individual, be he the Governor or the President.[21]

4. The Advocate-General

Advocate-General.

Each State shall have an Advocate-General for the State, an official corresponding to the Attorney-General of India, and having similar functions for the State. He shall be appointed by the Governor of the State and shall hold office during the pleasure of the Governor. Only a person who is qualified to be a Judge of a High Court can be appointed Advocate-General. He receives such remuneration as the Governor may determine.

He shall have the right to speak and to take part in the proceedings of, but no right to vote in, the Houses of the Legislature of the State [*Art.* 177].

REFERENCES

1. A glaring exception to this sound principle took place when the President, on the advice of the National Front Prime Minister Sri V.P. Singh, in December 1989, asked all the Governors to resign, simply because another Party had come to power at the Union. Of course, eventually, some of them were not required to resign.
2. Thus, Sri V.V. Giri, who was appointed Governor of U.P. in 1958, was appointed Governor of Kerala in 1960 for the unexpired portion of his term and in June 1962 he was reappointed Governor of Kerala for a second term, limited up to June 1964 (*Statesman*, 10-6-1962), Srimati Padmaja Naidu, Governor of West Bengal, also got a second term.
3. C.A.D., Vol. VII, p. 455.
4. Indeed there did occur some friction between the Governor and the Chief Minister during 1987-89 in Andhra Pradesh and Kerala where they belonged to different political parties. But, strikingly, there was disagreement between the Governor Govind Narain Singh and the Chief Minister of Bihar (1985); and Governor Smt. Sarla Grewal and the Chief Minister of Madhya Pradesh (1989) even though hailing from the same party.
5. Emoluments of Governor as enhanced *vide* Act No. 27 of 1998, s. 2 (w.e.f. 1.1.1996).
6. Of course, as has been pointed out in other contexts, the Upper House of the Union Legislature, *i.e.*, the Council of States or of the State Legislature, *i.e.*, the Legislative Council, is not subject to dissolution but is subject to a system of periodical retirement.

Hence, the President or the Governor's power of dissolution must be understood to refer to the dissolution of the House of the People and the Legislative Assembly, respectively.

In those States where the State Legislature consists of one House only [*Art.* 168(1)(b)] (p. 233, *post*), a dissolution of the Legislative Assembly results in the dissolution of the State Legislature (because there is no Legislative Council to survive.)

7. Only the Governor of Jammu & Kashmir is vested with the power to impose Governor's Rule under s. 92 of Constitution of J. & K.
8. The Governor may appoint a person to be the Chief Minister on his own estimation that such person is likely to command a majority in the State Assembly and he can exercise this power even before the Assembly is fully constituted. Such act, itself, would not establish *mala fides* on the part of the Governor [*Rajnarain* v. *Bhajanlal*, (1982) P.&H., dated 20-10-1982; *Statesman* (D)/21-10-1982].
9. *Secretary, Jaipur Development Authority, Jaipur* v. *Daulat Mal Jain,* (1997) 1 S.C.C. 35 (para 10).
10. It is striking that no member of the 1975 Abdullah Ministry of Jammu & Kashmir was initially a member of the State Legislature.
11. The Naga Hills-Tuensang Area has been taken out of this discretionary sphere, by making it a separate State, named Nagaland. Hence, Para 18 of the 6th Sch. has been omitted in 1971.
12. That is, as amended by the Constitution (7th Amendment) Act, 1956,and the Bombay Reorganisation Act, 1960. By the Constitution (32nd Amendment) Act, 1973, Andhra Pradesh has been taken out of Art. 371 and provided for separately, in *new* Art. 371D.
13. *Samsher* v. *State of Punjab*, AIR 1974 S.C. 2192 (paras 47, 88, 153).
14. This happened in the case of the Kerala Education Bill [*vide* In re *Kerala Education Bill* AIR 1958 S.C. 956]. In *Hoechst Pharamaceuticals* v. *State of Bihar*, AIR 1953 S.C. 1019 (para 89), the function under Art. 200 has been held to be discretionary.
15. In some cases, the Supreme Court has observed that unless a particular provision of the Constitution expressly *requires* the Governor to act in his discretion, his power to act without the advice of Ministers cannot be drawn by implication [*Sanjeevi* v. *State of Madras*, (1970) 2 S.C.C. 672 (*677*). But this observation is now to be read subject to the exceptional contingencies mentioned in the 7-Judge decision in [*Samsher* v. *State of Punjab*, AIR 1974 S.C. 2192, *above*].
16. The dismissal of the Tamil Nadu Governor, Prabhudas Patwari in October, 1980 [*Statesman,* 31-10-1980] demonstrates that the President's 'pleasure' under Art. 156(1) can be used by the Prime Minister to dismiss any Governor for political reasons, and without assigning any cause.
17. *Jagdambika Pal* v. *Union of India,*(1999) 9 S.C.C. 95.
18. *Vide* HALSBURY, LAWS OF ENGLAND (4th Ed. 1974), Vol. 8. Pp. 696-97.
19. *S.R. Bommai* v. *Union of India*, (1994) 3 S.C.C. 1.
20. *Ibid.*, para 395.
21. *Ibid.*, para 119.

CHAPTER 14

THE STATE LEGISLATURE

The Bi-cameral and Uni-cameral Legislatures.

THOUGH a uniform pattern of government is prescribed for the States, in the matter of the composition of the Legislature, the Constitution makes a distinction between the bigger and the smaller States. While the Legislature of every State shall include the Governor and, in some of the States, it shall consist of two Houses, namely, the Legislative Assembly and the Legislative Council, while in the rest, there shall be only one House, *i.e.,* the Legislative Assembly [*Art.* 168].

Owing to changes introduced since the inauguration of the Constitution, in accordance with the procedure laid down in Art. 169, the States having two Houses,[1] in 2008, are Andhra Pradesh;[2] Bihar; Maharashtra;[3] Karnataka and Uttar Pradesh[4] [*Art.* 168]. To these must be added Jammu & Kashmir, which has adopted a bi-cameral Legislature, by her own State Constitution.

Creation and abolition of Second Chambers in States.

It follows that in the remaining States,[1, 4] the Legislature is uni-cameral, that is, consisting of the Legislative Assembly only [*Art.* 168]. But the above list is not permanent in the sense that the Constitution provides for the *abolition* of the Second Chamber (that is, the Legislative Council) in a State where it exists as well as for the *creation* of such a Chamber in a State where there is none at present, by a simple procedure which does not involve an amendment of the Constitution. The procedure prescribed is a resolution of the Legislative Assembly of the State concerned passed by a special majority (that is, a majority of the total membership of the Assembly not being less than two-thirds of the members actually present and voting), followed by an Act of Parliament [*Art.* 169].

This apparently extraordinary provision was made for the States (while there was none corresponding to it for the Union Legislature) in order to meet the criticism, at the time of the making of the Constitution, that some of *our* States being of poorer resources, could ill afford to have the extravagance of two Chambers. This device was, accordingly, prescribed to enable each State to have a Second Chamber or not according to its own wishes. It is interesting to note that, taking advantage of this provision, the State of Andhra Pradesh, in 1957, *created* a Legislative Council, leading to the enactment of the Legislative Council Act, 1957, by Parliament. Through the same process, it has been abolished in 1985.[1]

On the other hand, West Bengal and Punjab have abolished their Second Chambers, pursuing the same procedure.[4]

Composition of the Legislative Council.

The size[5] of the Legislative Council shall vary with that of the Legislative Assembly,—the membership of the Council being not more than one-third of the membership of the Legislative Assembly but not less than 40. This provision has been adopted so that the Upper House (the Council) may not get a predominance in the Legislature [*Art.* 171(1)].

The system of composition of the Council as laid down in the Constitution is not final. The final power of providing the composition of this Chamber of the State Legislature is given to the Union Parliament [*Art.* 171(2)]. But until Parliament legislates on the matter, the composition shall be as given in the Constitution, which is as follows: It will be a partly nominated and partly elected body,—the election being an indirect one and in accordance with the principle of proportional representation by the single transferable vote. The members being drawn from various sources, the Council shall have a variegated composition.

Broadly speaking, 5/6 of the total number of members of the Council shall be indirectly elected and 1/6 will be nominated by the Governor. Thus,—

(a) 1/3 of the total number of members of the Council shall be elected by electorates consisting of members of *local bodies,* such as municipalities, district boards.

(b) 1/12 shall be elected by electorates consisting of *graduates* of three years' standing residing in that State.

(c) 1/12 shall be elected by electorates consisting of persons engaged for at least three years in *teaching* in educational institutions within the State, not lower in standard than secondary schools.

(d) 1/3 shall be elected by members of the Legislative Assembly from amongst persons who are *not members* of the Assembly.

(e) The remainder shall be nominated by the Governor from persons having knowledge or practical experience in respect of such matters as literature, science, art, co-operative movement and social service (The courts cannot question the *bona fides* or propriety of the Governor's nomination in any case).

Composition of the Legislative Assembly.

The Legislative Assembly of each State shall be composed of members chosen by *direct* election on the basis of adult suffrage from territorial constituencies. The number of members of the Assembly shall be not more than 500 nor less than 60. The Assembly in Mizoram and Goa shall have only 40 members each.

There shall be a proportionately equal representation according to population in respect of each territorial constituency within a State. There will be a readjustment by Parliament by law, upon the completion of each census [*Art.* 170].

As stated already, the Governor has the power to nominate[6] *one* member of the Anglo-Indian community as he deems fit, if he is of opinion that they are not adequately represented in the Assembly [*Art.* 333]. Such reservation will cease on the expiration of sixty[7] years from the commencement of the Constitution [*Art.* 334].

The duration of the Legislative Assembly is five years, but—

Duration of the Legislative Assembly.

(i) It may be dissolved sooner than five years, by the Governor.[8]

(ii) The term of five years may be extended in case of a Proclamation of Emergency by the President. In such a case, the Union Parliament shall have the power to extend the life of the Legislative Assembly up to a period not exceeding six months after the Proclamation ceases to have effect, subject to the condition that such extension shall not exceed one year at a time [*Art.* 172(1)].

Duration of the Legislative Council.

The Legislative Council shall not be subject to dissolution. But one-third of its members shall retire on the expiry of every second year [*Art.* 172(2)]. It will thus be a permanent body like the Council of States, only a fraction of its membership being changed every third year.

A Legislative Assembly shall have its Speaker and Deputy Speaker, and a Legislative Council shall have its Chairman and Deputy Chairman, and the provisions relating to them are analogous to those relating to the corresponding officers of the Union Parliament.

Qualifications for membership of the State Legislature.

A person shall not be qualified to be chosen to fill a seat in the Legislature of a State unless he—

(a) is a citizen of India;

(b) is, in the case of a seat in the Legislative Assembly, not less than twenty-five years of age and, in the case of a seat in the Legislative Council, not less than thirty years of age; and

(c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament [*Art.* 173].

Thus, the Representation of the People Act, 1951, has provided that a person shall not be elected either to the Legislative Assembly or the Council, unless he is himself an elector for any Legislative Assembly constituency in that State.

Disqualifications for membership.

The disqualifications for membership of a State Legislature as laid down in Art. 191 of the Constitution are analogous to the disqualifications laid down in Art. 102 relating to membership of either House of Parliament. Thus,—

A person shall be disqualified for being chosen as, and for being a member of the Legislative Assembly or Legislative Council of a State if he—

(a) holds any office of profit under the Government of India or the Government of any State, other than that of a Minister for the Indian Union or for a State or an office declared by a law of the State not to disqualify its holder (many States have passed such laws declaring certain offices to be offices the holding of which will not disqualify its holder for being a member of the Legislature of that State);

(b) is of unsound mind as declared by a competent court;

(c) is an undischarged insolvent;

(d) is not a citizen of India or has voluntarily acquired the citizenship of a foreign State or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) is so disqualified by or under any law made by Parliament (in other words, the law of Parliament may disqualify a person for membership even of a State Legislature, on such grounds as may be laid down in such law). Thus, the Representation of the People Act, 1951, has laid down some grounds of disqualification, *e.g.*, conviction by a court, having been found guilty of a corrupt or illegal practice in relation to election, being a director or managing agent of a corporation in which Government has a financial interest (under conditions laid down in that Act).

Article 192 lays down that if any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned above, the question shall be referred to the Governor of that State for decision who will act according to the opinion of the Election Commission. His decision shall be final and not liable to be questioned in any court of law.

Legislative procedure in a State having Bi-cameral Legislature, as compared with that in Parliament.

The legislative procedure in a State Legislature having two Chambers is broadly similar to that in Parliament, save for differences on certain points to be explained presently.

I. *As regards Money Bills,* the position is the same. The Legislative Council shall have no power save to make recommendations to the Assembly for amendments or to withhold the Bill for a period of 14 days from the date of receipt of the Bill. In any case, the will of the Assembly shall prevail, and the Assembly is not bound to accept any such recommendations.

It follows that there cannot be any deadlock between the two Houses at all as regards Money Bills.

Legislative Council compared with Council of States.

II. *As regards Bills other than Money Bills,* too, the only power of the Council is to interpose some *delay* in the passage of the Bill for a period of time (3 months) [*Art.* 197(1)(b)] which is, of course, larger than in the case of Money Bills. The Legislative Council of a State, thus, shall not be a revising but mere *advisory* or *dilatory* Chamber. If it disagrees to such a Bill, the Bill must have *second journey* from the Assembly to the Council, but ultimately the view of the Assembly shall prevail and in the second journey, the Council shall have no power to withhold the Bill for more than a month [*Art.* 197(2)(b)].

Herein the procedure in a State Legislature differs from that in the Parliament, and it renders the position of the Legislative Council even weaker than that of the Council of the States. The difference is as follows:

Provisions for resolving deadlock between two Houses.

While disagreement between the two Houses of Parliament is to be resolved by a *joint sitting*, there is *no such provision* for solving differences between the two Houses of the State Legislature,—in this latter case, the will of the lower House, *viz.*, the Assembly, shall ultimately prevail and the Council shall have no more power than to interpose some delay in the passage of the Bill to which it disagrees.

This difference of treatment in the two cases is due to the adoption of two different principles as regards the Union and the State Legislatures. (a) As to Parliament,—it has been said that since the Upper House represents the federal character of the Constitution, it should have a status better than that of a mere dilatory body. Hence, the Constitution provides for a joint sitting of both Houses in case of disagreement between the House of the People and the Council of States, though of course, the House will ultimately have an upper hand, owing to its numerical majority at the joint sitting. (b) As regards the two Houses of the State Legislature, however, the Constitution of India adopts the English system founded on the Parliament Act, 1911, *viz.,* that the Upper House must eventually give way to the Lower House which represents the will of the people. Under this system, the Upper House has no power to obstruct the popular House other than to effect some delay. This democratic provision has been adopted in *our* Constitution in the case of the State Legislature inasmuch as in this case, no question of federal importance of the Upper House arises.

The provisions as regards Bills *other than Money Bills* may now be summarised:

Comparison of procedure in Parliament and State Legislature.

(a) *Parliament.* If a Bill (other than a Money Bill) is passed by one House and (i) the other House rejects it or does not return it within six months, or (ii) the two Houses disagree as to amendment, the President may convene a joint sitting of the Houses, for the purpose of finally deliberating and voting on the Bill. At such joint sitting, the vote of the *majority of both Houses present and voting shall prevail* and the Bill shall be deemed to have been passed by both Houses with such amendments as are agreed to by such majority; and the Bill shall then be presented for his assent [*Art.* 108].

(b) *State Legislature.* (i) If a Bill (other than a Money Bill) is passed by the Legislative Assembly and the Council (a) rejects the Bill, or (b) passes it with such amendments as are not agreeable to the Assembly, or (c) does not pass the Bill within *3 months* from the time when it is laid before the Council,—the Legislative Assembly may again pass the Bill with or without further amendments, and transmit the Bill to the Council again [*Art.* 197(1)].

If on this second occasion, the Council—(a) again rejects the Bill, or (b) proposes amendments, or (c) does not pass it *within one month* of the date on which it is laid before the Council, the Bill shall be deemed to have been passed by both Houses, and then presented to the Governor for his assent [*Art.* 197(2)].

In short, in the State Legislature, a Bill as regards which the Council does not agree with the Assembly, shall have two journeys from the Assembly to the Council. In the first journey, the Council shall not have the power to withhold the Bill for more than three months and in the second journey, not more than one month, and at the end of this period, the Bill shall be deemed to have been passed by both the Houses, even though the Council remains altogether inert [*Art.* 197].

(ii) The foregoing provision of the Constitution is applicable only as regards Bills *originating in the Assembly.* There is no corresponding provision for Bills originating in the Council. If, therefore, a Bill passed by the Council is transmitted to the Assembly and rejected by the latter, there is an end to the Bill.

The relative positions of the two Houses of the Union Parliament and of a State Legislature may be graphically shown as follows:

I. As regards *Money Bills, the position* is similar at the Union and the States:

(a) A Money Bill cannot originate in the Second Chamber or Upper House (*i.e.*, the Council of States or the Legislative Council).

(b) The Upper House (*i.e.*, the Council of States or the Legislative Council) has no power to amend or reject such Bills. In either case, the Council can only make recommendations when a Bill passed by the lower House (*i.e.*, the House of the People or the Legislative Assembly, as the case may be) is transmitted to it. It finally rests with the lower House to accept or reject the recommendations made by the Upper House. If the House of the People or the Legislative Assembly (as the case may be) does not accept any of the recommendations, the Bill is deemed to have been passed by the Legislature in the form in which it was passed by the lower House and then presented to the President or the Governor (as the case may be), for his assent. If the lower House, on the other hand, accepts any of the recommendations of the Upper House, then the Bill shall be deemed to have been passed by the Legislature in the form in which it stands after acceptance of such recommendations.

On the other hand, if the Upper House does not return the Money Bill transmitted to it by the Lower House, within a period of 14 days from the date of its receipt in the Upper House, the Bill shall be deemed to have been passed by the Legislature, at the expiry of the period of 14 days, and then presented to the President or the Governor, as the case may be, even though the Upper House has not either given its assent or made any recommendations.

(c) There is no provision for resolving any deadlock as between the two Houses, as regards Money Bills, because no deadlock can possibly arise. Whether in Parliament or in a State Legislature, the will of the lower House (House of the People or the Legislative Assembly) shall prevail, in case the Upper House does not agree to the Bill as passed by the lower House.

II. *As regards Bills other than Money Bills*:

Parliament	*State Legislature*
(a) Such Bills may be introduced in either House of Parliament.	(a) Such Bills may be introduced in either House of a State Legislature.
(b) A Bill is deemed to have been passed by Parliament only if both Houses have agreed to the Bill in its original form or with amendments agreed to by both Houses. In case of disagreement between the two Houses in any of the following manner, the deadlock may be solved only by a joint sitting of the two Houses, if summoned by the President.	(b) The Legislative Council has no co-ordinate power, and in a case of disagreement between the two Houses, the will of the Legisative Assembly shall ultimately prevail. Hence, there is no provision for a joint sitting for resolving a deadlock between the two Houses.
(c) The disagreement may take place if a House, on receipt of a Bill passed by the other House— (i) rejects the Bill; or (ii) proposes amendments as are not agreeable to the other House; or (iii) does not pass the Bill within six months of its receipt of the Bill.	(c) A disagreement between the two Houses may take place if the Legislative Council, *on receipt of a Bill passed by the Assembly*— (i) rejects the Bill; or (ii) makes amendments to the Bill, which are not agreed to by the originating House; or (iii) does not pass the Bill within three months from the date of its receipt from the originating House. While the period for passing a Bill received from the lower House is six months in the case of the Council of States, it is three months only in the case of the Legislative Council.
(d) In a case of disagreement, a passing of the Bill by the House of the People, a second time, cannot over-ride the Council of States. The only means of resolving the deadlock is a Joint sitting of the two Houses. But if the President, in his discretion, does not summon a joint sitting, there is an end of the Bill and, thus, the Council of States has effective power, subject to a joint sitting, of preventing the passing of a Bill.	(d) In case of such disagreement, a passing of the Bill by the Assembly for a second time is sufficient for the passing of the Bill by the Legislature, and if the Bill is so passed and transmitted to the Legislative Council again, the only thing that the Council may do is to withhold it for a period of one month from the date of its receipt of the Bill on its second journey. If the Council either rejects the Bill again, or proposes amendments not

Parliament	*State Legislature*
	agreeable to the Assembly or allows one month to elapse without passing the Bill, the Bill shall be deemed to have been passed by the State Legislature in the form in which it is passed by the Assembly for the second time, with such amendments, if any, as have been made by the Council and as are agreed to by the Assembly.
	(e) The foregoing procedure applies *only* in the case of disagreement relating to a Bill *originating in the Legislative Assembly.*
	In the case of a Bill originating in the Legislative Council and transmitted to the Assembly, after its passage in the Council, if the Legislative Assembly either rejects the Bill or makes amendments which are not agreed to by the Council, there is an immediate end of the Bill, and no question of its passage by the Assembly would arise.

Utility of the Second Chamber in a State.

It has been clear that the position of Legislative Council is inferior to that of the Legislative Assembly so much so that it may well be considered as a surplusage.

(a) The very composition of the Legislative Council, renders its position weak, being partly elected and partly nominated, and representing various interests.

(b) Its very existence depends upon the will of the Legislative Assembly, because the latter has the power to pass a resolution for the abolition of the second Chamber by an Act of Parliament.

(c) The Council of Ministers is responsible only to the Assembly.

(d) The Council cannot reject or amend a Money Bill. It can only withhold the Bill for a period not exceeding 14 days or make recommendations for amendments.

(e) As regards ordinary legislation (*i.e.,* with respect to Bills other than Money Bills), too, the position of the Council is nothing but subordinate to the Assembly, for it can at most interpose a delay of four months (in two journeys) in the passage of a Bill originating in the Assembly and, in case of disagreement, the Assembly will have its way without the concurrence of the Council.

In the case of a Bill originating in the Council, on the other hand, the Assembly has the power of rejecting and putting an end to the Bill forthwith.

It will thus be seen that the second Chamber in a State is not even a revising body like the second Chamber in the Union Parliament which can, by its dissent, bring about a deadlock, necessitating a joint sitting of both Houses to effect the passage of the Bill (other than a Money Bill). Nevertheless, by reason of its composition by indirect election and nomination of persons having special knowledge, the Legislative Council commands a better calibre and even by its dilatory power, it serves to check hasty legislation by bringing to light the shortcomings or defects of any ill-considered measure.

When a Bill is presented before the Governor after its passage by the Houses of the Legislature, it will be open to the Governor to take any of the following steps:

Governor's power of veto.

(a) He may declare his *assent* to the Bill, in which case, it would become law at once; or,

(b) He may declare that he withholds his assent to the Bill, in which case the Bill fails to become a law; or,

(c) He may, in the case of a Bill other than a Money Bill, return the Bill with a message.

(d) The Governor may reserve[9] a Bill for the consideration of the President. In one case reservation is compulsory, *viz.*, where the law in question would derogate from the powers of the High Court under the Constitution.

In the case of a Money Bill, so reserved, the President may either declare his assent or withhold his assent. But in the case of a Bill other than a Money Bill, the President may, instead of declaring his assent or refusing it, direct the Governor to *return* the Bill to the Legislature for reconsideration. In the latter case, the Legislature must reconsider the Bill within six months and if it is passed again, the Bill shall be presented to the President again. But it shall not be obligatory upon the President to give his assent in this case too [*Art.* 201].

It is clear that a Bill which is reserved for the consideration of the President shall have no legal effect until the President declares his assent to it. But no time limit is imposed by the Constitution upon the President either to declare that he assents or that he withholds his assent. As a result, it would be open to the President to keep a Bill of the State Legislature pending at his hands for an indefinite period of time, without expressing his mind.

It should also be noted that there is a third alternative for the President which was demonstrated in the case of the Kerala Education Bill, *viz.*, that when a reserved Bill is presented to the President he may, for the purpose of deciding whether he should assent to, or return the Bill, refer to the Supreme Court, under

Art. 143, for its advisory opinion where any doubts as to the constitutionality of the Bill arise in the President's mind.

Veto Powers of President and Governor, compared. The veto powers of the President and Governor may be presented graphically, as follows:

President	*Governor*
(A) 1. May assent to the Bill passed by the Houses of Parliament.	1. May assent to the Bill passed by the State Legislature.
2. May declare that he withholds his assent, in which case, the Union Bill fails to become law.	2. May declare that he withholds his assent, in which case, it fails to become law.
3. In case of a Bill other than a Money Bill, may return it for reconsideration by Parliament, with a message to both Houses. If the Bill is again passed by Parliament, with or without amendments, and again presented to the President, the President shall have no other alternative than to declare his assent to it.	3. In case of a Bill other than a Money Bill, may return it for reconsideration by the State Legislature, with a message. If the Legislature again passes the Bill with or without amendments, and it is again presented to the Governor, the Governor shall have no other alternative than to declare his assent to it.
	4. Instead of either assenting to, withholding assent from, or returning the Bill for reconsideration by the State Legislature, Governor may *reserve* a Bill for consideration of the President, in any case he thinks fit. Such reservation is, however, obligatory if the Bill is so much derogatory to the powers of the High Court that it would endanger the constitutional position of the High Court, if the Bill became law.
(B) In the case of a State Bill reserved by the Governor for the President's consideration (as stated in para 4 of col. 2):	
(a) If it is a Money Bill, the President may either declare that he assents to it or withholds his assent to it.	
(b) If it is a Bill other than a Money Bill, the President may—	
(i) declare that he assents to it or that he withholds his assent from it, or	

President	*Governor*
(ii) return the Bill to the State Legislature with a message for reconsideration, in which case, the State Legislature must reconsider the Bill within six months, and if it is passed again, with or without amendments, it must be again presented, *direct*, to the President for his assent, but the President is *not* bound to give his assent, even though the Bill has been passed by the State Legislature, for a second time.	Once the Governor reserves a Bill for the President's consideration, the subsequent enactment of the Bill is in the hands of the President and the Governor shall have no further part in its career.

The Governor's power to make Ordinances [*Art.* 213], having the force of an Act of the State Legislature, is similar to the Ordinance-making power of the President in the following respects :

Ordinance-making power of Governor.

(a) The Governor shall have this power only when the Legislature, or both Houses thereof, are not in session;

(b) It is not a discretionary power, but must be exercised with the aid and advice of ministers;

(c) The Ordinance must be laid before the State Legislature when it re-assembles, and shall automatically cease to have effect at the expiration of six weeks from the date of re-assembly, unless disapproved earlier by that Legislature.

(d) The Governor himself shall be competent to withdraw the Ordinance at any time.

(e) The scope of the Ordinance-making power of the Governor is co-extensive with the legislative powers of the State Legislature, and shall be confined to the subjects in Lists II and III of Sch. VII.

But as regards repugnancy with a Union law relating to a *concurrent* subject the Governor's Ordinance will prevail notwithstanding repugnancy, if the Ordinance had been made in pursuance of 'instructions' of the President.

The peculiarity of the Ordinance-making power of the Governor is that he cannot make Ordinances without 'instructions' from the President if—

(a) A Bill containing the same provisions would under the Constitution have required the previous sanction of the President for the introduction thereof into the Legislature;[10] or (b) the Governor would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President;[11] or (c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President[12] [*Art.* 213].

Ordinance-making power of President and Governor, compared.

The Ordinance-making powers of the President and a Governor may be graphically presented as follows:

<table>
<tr><th><i>President</i></th><th><i>Governor</i></th></tr>
<tr><td>1. Can make Ordinance only when either of the two Houses of Parliament is not in session.</td><td>1. Can make Ordinance only when the State Legislature or either of the two Houses (where the State Legislature is bi-cameral) is not in session.</td></tr>
<tr><td colspan="2">The President or Governor must be satisfied that circumstances exist which render it necessary for him to take immediate action.</td></tr>
<tr><td></td><td>But Governor cannot make an Ordinance relating to three specified matters, without instructions from President (see <i>above</i>).</td></tr>
<tr><td>2. Ordinance has the same force and is subject to the same limitations as an Act of Parliament.</td><td>2. Ordinance has the same force and is subject to the same limitations as an Act of the State Legislature.</td></tr>
<tr><td></td><td>But as regards repugnancy with a Union law relating to a Concurrent subject, if the Governor's Ordinance has been made in pursuance of 'instructions of the President', the Governor's Ordinance shall prevail as if it were an Act of the State Legislature which had been reserved for the consideration of the President and assented to by him.</td></tr>
<tr><td>3. (a) Must be laid before both Houses of Parliament when it re-assembles.</td><td>3. (a) Must be laid before the Legislative Assembly or before both Houses of the State Legislature (where it is bi-cameral), when the Legislature re-assembles.</td></tr>
<tr><td>(b) Shall cease to operate on the expiry of six weeks from the re-assembly of Parliament or, if, before that period, resolutions disapproving the Ordinance are passed by both Houses, from the date of the second of such resolutions.</td><td>(b) Shall cease to operate on the expiry of six weeks from the re-assembly of the State Legislature or, if before the expiry of that period, resolutions disapproving the Ordinance are passed by the Assembly or, where there are two Houses the resolution passed by</td></tr>
</table>

President	*Governor*
	the Assembly is agreed to by the Council, from the date of the passing of the resolution by the Assembly in the first case, and of the agreement of the Council in the second case.

Privileges of a State Legislature.

The privileges of the Legislature of a State are similar to those of the Union Parliament inasmuch as the constitutional provisions [*Arts.* 105 and 194] are identical. The question of the privileges of a State Legislature has been brought to the notice of the public, particularly in relation to the power of the Legislature to punish for contempt and the jurisdiction of the Courts in respect thereof. Though all aspects of this question have not yet been settled, the following propositions may be formulated from the decisions of the Supreme Court:

(a) Each House of the State Legislature has the power to punish for breach of its privileges or for contempt.

(b) Each House is the sole judge of the question whether any of its privileges has, in particular case, been infringed, and the Courts have no jurisdiction to interfere with the decision of the House on this point.

The Court cannot interfere with any action taken for contempt unless the Legislature or its duly authorised officer is seeking to assert a privilege not known to the law of Parliament; or the notice issued or the action taken was without jurisdiction.

(c) No House of the Legislature has, however, the power to create for itself any new privilege not known to the law and the Courts possess the power to determine whether the House in fact possesses a particular privilege.

(d) It is also competent for a High Court to entertain a petition for *habeas corpus* under Art. 226 or for the Supreme Court, under Art. 32, challenging the legality of a sentence imposed by a Legislature for contempt on the ground that it has violated a fundamental right of the petitioner and to release the prisoner on bail, pending disposal of that petition.

(e) But once a privilege is held to exist, it is for the House to judge the occasion and its manner of exercise. The Court cannot interfere with an *erroneous* decision by the House or its Speaker in respect of a breach of its privilege.

New States added since 1950.

Apart from those States which have merely changed their names (*e.g.*, Madras has changed its name to *Tamil Nadu;* Mysore to *Karnataka;* United Provinces was renamed Uttar Pradesh immediately after the adoption of the Constitution), there has been an addition of various items in the list of States in the First Schedule to the Constitution, by reason of which a brief note should be given as to the *new* items to make the reader familiar as to their identity.

Andhra Pradesh. The State of 'Andhra' was created by the Andhra State Act, 1953, comprising certain areas taken out of the State of Madras, and it was renamed 'Andhra Pradesh' by the States Reorganisation Act, 1956.

Gujarat. The Bombay Reorganisation Act, 1960 split up the State of Bombay into two States, Gujarat and Maharashtra.

Kerala. The State of Kerala was created by the States Reorganisation Act, 1956, in place of the Part B State of Travancore-Cochin of the original Constitution.

Maharashtra. See under Gujarat, *above*.

Nagaland. Nagaland was created a separate State by the State of Nagaland Act, 1962, by taking out the Naga Hills-Tuensang area out of the State of Assam.

Haryana. By the Punjab Reorganisation Act, 1966, the 17th State of the Union of India was constituted by the name of Haryana, by carving out a part of the territory of the State of Punjab.

Karnataka. The State of Mysore was formed by the States Reorganisation Act, 1956, out of the original Part B State of Mysore. It has been renamed, in 1973, as *Karnataka*.

Himachal Pradesh. Some of the Union Territories had, of late, been demanding promotion to the status of a State. Of these, Himachal Pradesh became the fore-runner on the enactment of the State of Himachal Pradesh Act, 1970, by which Himachal Pradesh was added as the 18th State in the list of States, and omitted from the list of Union Territories, in the First Schedule of the Constitution.

Manipur and Tripura. In the same manner, Manipur and Tripura were lifted up from the status of Union Territories (original Part C States), by the North-Eastern Areas (Reorganisation) Act, 1971.

Meghalaya. Meghalaya was initially created a 'sub-State' or 'autonomous State' within the State of Assam, by the Constitution (22nd Amendment) Act, 1969, by the insertion of Arts. 241 and 371A. Subsequently, it was given the full status of a State and admitted in the 1st Schedule as the 21st State, by the North-Eastern Area (Reorganisation) Act, 1971.

Sikkim. As has been explained earlier, Sikkim (a Protectorate of India) was given the status of an 'associate State' by the Constitution (35th Amendment) Act, 1974, and thereafter added to the 1st Schedule as the 22nd State, by the Constitution (36th Amendment) Act, 1975.

Mizoram. By the State of Mizoram Act, 1986, Mizoram was elevated from the status of a Union Territory to be the 23rd State in the 1st Schedule of the Constitution.

Arunachal Pradesh. By a similar process, statehood was conferred on the Union Territory of Arunachal Pradesh, by enacting the State of Arunachal Pradesh Act, 1986.

Goa. Goa was separated from Daman and Diu and made a State, by the Goa, Daman and Diu Reorganisation Act, 1987.

Chhattisgarh Chhattisgarh was carved out of the territories of the Madhya Pradesh by the Madhya Pradesh Reorganisation Act, 2000.

Uttarakhand Initially, Uttaranchal was created out of the territories of the Uttar Pradesh by the Uttar Pradesh Reorganisation Act, 2000. It was renamed as Uttarakhand by the Uttaranchal (Alteration of Name) Act, 2006.

Jharkhand Jharkhand was created by carving out a part of the territories of the Bihar by the Bihar Reorganisation Act, 2000.

REFERENCES

1. (a) The Legislative Council in Andhra Pradesh has been abolished by the Andhra Pradesh Legislative Council (Abolition) Act, 1985. (b) By reason of s. 8(2) of the Constitution (7th Amendment) Act, 1956, Madhya Pradesh shall have a second House (Legislative Council) only after a notification to this effect has been made by President. No such notification having been made so far, Madhya Pradesh is still having one Chamber. (c) The Legislative Council of Tamil Nadu has been abolished in August, 1986, by passing the Tamil Nadu Legislative Council (Abolition) Act, 1986.
2. Revived by the Andhra Pradesh Legislative Council Act, 2005 (1 of 2006).
3. Maharashtra has been created out of Bombay, by the Bombay Reorganisation Act, 1960.
4. West Bengal has abolished its Legislative Council w.e.f. 1-8-1969 by a notification under the West Bengal Legislative Council (Abolition) Act, 1969, and Punjab has abolished its Legislative Council, under the Punjab Legislative Council (Abolition) Act, 1969.
5. See Table XV for membership of the State Legislatures.
6. The number of Anglo-Indian members so nominated by the Governor of the several States as in September, 1990, was as follows : Andhra 1; Bihar 1; Karnataka 1; Kerala 1; Madhya Pradesh 1; Tamil Nadu 1; Maharashtra 1; Uttar Pradesh 1; West Bengal 1. The present position is not available.
7. The original period of ten years has been extended to sixty years, gradually by the Constitution (8th Amendment) Act, 1959, the 23rd Amendment Act, 1969, the 45th Amendment Act, 1980, the 62nd Amendment Act, 1989 and the 79th Amendment Act, 1999.
8. In this context, we should refer to the much-debated question as to whether the Governor has any discretion to dissolve the Assembly without or against the advice of the Chief Minister, or through the device of suspending the State Legislature under Art. 356. In the general election to the *Lok Sabha*, held in March, 1977, the Congress Party was routed by the Janata Party. It was urged by the Janata Government at the Centre that in view of this verdict, the Congress Party had no moral right to continue in power in 9 States, viz., Bihar, Haryana, Himachal Pradesh, M.P., Orissa, Punjab, Rajasthan, U.P., West Bengal. In pursuance of this view, the Union Home Minister (Mr. Charan Singh) issued on, 18-4-1977, an 'appeal' to the Chief Ministers of these 9 States to advise their respective Governors to dissolve the Assemblies and hold an election in June, 1977 (while their extended term would have expired in March, 1978). But the Congress Party advised the Chief Ministers not to yield to this appeal or pressure, and contended that the proposition that the English Sovereign can dissolve Parliament without the advice of the Prime Minister was wrong and obsolete and that the Crown's prerogative in this behalf had been turned into a privilege of the Prime Minister. In short, under the British Parliamentary system which had been adopted under the Indian Constitution, a Governor could not dissolve the Assembly contrary to the advice of the Chief Minister of the State. It was also urged that Art. 356 was not intended to be used for such purposes.

The question was eventually taken to the Supreme Court by some of the affected States by way of a suit (under Art. 131) against the Union of India. The suit was dismissed by a Bench of 7 Judges, at the hearing on the prayer for temporary injunction, though the Judges gave separate reasons in 6 concurring judgments [*State of Rajasthan* v. *Union of India*, AIR 1977 S.C. 1361]. The Judges agreed on the following points: (i) The reasons behind an Executive decision to dissolve the Legislature are *political* and not justiciable in a court of law. (ii) So also is the question of the President's satisfaction for the purpose of using the power under Art. 356,—unless it was shown that there was no satisfaction at all or the satisfaction was based on extraneous grounds [paras 59, 83 (BEG. C.J.); 124 (CHANDRACHUD, J.); 144 (BHAGWATI & GUPTA J.J.); 170 (GOSWAMI, J.); 179 (UNTWALIA, J.); 206 (FAZAL ALI, J.)]. All the Judges held that on the facts on the record, it was not possible to hold that the order of the President under Art. 356, suspending the constitutional system in the relevant States was actuated by *mala fides* or extraneous considerations.

Exercise of power under Art. 356 was received again by a 9-Judge Bench of the Supreme Court in *S.R. Bommai* v. *Union of India*, (1994) 3 S.C.C. 1. Explaining the *Rajasthan* case it has laid down the following points: (i) Proclamation under Art. 356 is subject to judicial review but to a limited extent, *e.g.* whether there was any material, whether it was relevant, whether *mala fide* etc. (ii) Till the proclamation is approved by Parliament it is not permissible for the President to take any irreversible action (such as dissolution of the House) under Art. 356(1)(a), (b), or (c). (iii) Even if approved by the Parliament the Court may order *status quo ante* to be restored. (iv) If the ruling party in the State suffers a defeat in election to the Lok Sabha it will not be a ground for exercise of power under Art. 356.

9. The entire function of reservation and veto is discretionary and non-justiciable [*Hoechst Pharmaceuticals* v. *State of Bihar*, AIR 1953 S.C. 1019 (*para* 89)].
10. E.g., An Ordinance imposing reasonable restrictions upon inter-State trade or commerce [*Art.* 304, Proviso].
11. E.g., An Ordinance which might affect the powers of the Union [*Art.* 220].
12. E.g., An Ordinance affecting powers of the High Court [2nd Prov. on to *Art.* 200].

CHAPTER 15

THE STATE OF JAMMU & KASHMIR

Peculiar position of the State.

THE State of Jammu & Kashmir holds a peculiar position under the Constitution of India.

It forms a part of the 'territory of India' as defined in Art. 1 of the Constitution, being the fifteenth State included in the First Schedule of the Constitution, as it stands amended. In the original Constitution, Jammu & Kashmir was specified as a 'Part B' State. The States Reorganisation Act, 1956, abolished the category of Part B States and the Constitution (7th Amendment) Act, 1956, which implemented the changes introduced by the former Act, included Jammu & Kashmir in the list of the 'States' of the Union of India, all of which were now included in one category.

Nevertheless, the special constitutional position which Jammu & Kashmir enjoyed under the original Constitution [*Art.* 370] has been maintained, so that all the provisions of the Constitution of India relating to the States in the First Schedule are *not* applicable to Jammu & Kashmir even though it is one of the States specified in that Schedule.

History of the integration of Jammu and Kashmir with India.

To understand why Jammu & Kashmir, being a State included in the First Schedule of the Constitution of India, should yet be accorded a separate treatment, a retrospect of the development of the constitutional relationship of the State with India becomes necessary. Under the British regime, Jammu & Kashmir was an Indian State ruled by a hereditary Maharaja. On the 26th of October, 1947, when the State was attacked by Azad Kashmir Forces with the support of Pakistan, the Maharaja (Sir Hari Singh) was obliged to seek the help of India, after executing an Instrument of Accession similar to that executed by the Rulers of other Indian States. By the Accession the Dominion of India acquired jurisdiction over the State with respect to the subjects of Defence, External Affairs and Communications, and like other Indian States which survived as political units at the time of the making of the Constitution of India, the State of Jammu & Kashmir was included as a Part B State in the First Schedule of the Constitution of India, as it was promulgated in 1950.

Position of the State under the original Constitution of India.

But though the State was included as a Part B State, all the provisions of the Constitution applicable to Part B States were not extended to Jammu & Kashmir. This peculiar position was due to the fact that having regard to the circumstances in which the State acceded to India, the

Government of India had declared that it was the people of the State of Jammu & Kashmir, acting through their Constituent Assembly, who were to finally determine the Constitution of the State and the jurisdiction of the Union of India. The applicability of the provisions of the Constitution regarding this State were, accordingly, to be in the nature of an interim arrangement. (This was the substance of the provision embodied in Art. 370 of the Constitution of India.)

Implications of the Accession.

Since the liberality of the Government of India has been misunderstood and misinterpreted in interested quarters, overlooking the *legal* implications of the Accession of the State to India, we should pause for a moment to explain these legal implications lest they be lost sight of in the turmoil of political events which have clouded the patent fact of the Accession. The first thing to be noted is that the Instrument of Accession signed by Maharaja Hari Singh on the 26th October, 1947, was in the *same form*[1] as was executed by the Rulers of the numerous other States which had acceded to India following the enactment of the Indian Independence Act, 1947. The legal consequences of the execution of the Instrument of Accession by the Ruler of Jammu & Kashmir cannot, accordingly, be in any way different from those arising from the same fact in the case of the other Indian States. It may be recalled[2] that owing to the lapse of paramountcy under s. 7(1)(b) of the Indian Independence Act, 1947, the Indian States regained the position of absolute sovereignty which they had enjoyed prior to the assumption of suzerainty by the British Crown. The Rulers of the Indian States thus became unquestionably competent to accede to either of the newly created Dominions of India and Pakistan, in exercise of their sovereignty. The legal basis[3] as well as the form of Accession were the same in the case of those States which acceded to Pakistan and those which acceded to India. There is, therefore, no doubt that by the act of Accession the State of Jammu & Kashmir became *legally and irrevocably* a part of the territory of India and that the Government of India was entitled to exercise jurisdiction over the State with respect to those matters to which the Instrument of Accession extended. If, in spite of this, the Government of India had given an assurance to the effect that the Accession or the constitutional relationship between India and the State would be subject to confirmation by the people of the State, under no circumstances can any *third party* take advantage of such extra-legal assurances and claim that the legal act had not been completed.

When India made her Constitution in 1949, it is natural that this dual attitude of the Government of India should be reflected in the position

Articles of the Constitution which apply of their own force to the State.

offered to the State of Jammu & Kashmir within the framework of that Constitution. The act of Accession was unequivocally given legal effect by declaring Jammu & Kashmir a part of the territory of India [*Art.* 1]. But the application of the other provisions of the Constitution of India to Jammu & Kashmir was placed on a tentative basis, subject to the eventual approval of the Constituent Assembly of the State. The Constitution thus provided that the only Articles of the Constitution which would apply of their own force to Jammu & Kashmir were—Arts. 1 and 370. The application of the other

Articles was to be determined by the President in consultation with the Government of the State [*Art. 370*]. The legislative authority of Parliament over the State, again, would be confined to those items of the Union and Concurrent Lists as correspond to matters specified in the Instrument of Accession. The above interim arrangement would continue until the Constituent Assembly for Jammu & Kashmir made its decision. It would then communicate its recommendations to the President, who would either abrogate Art. 370 or make such modification as might be recommended by that Constituent Assembly.

The Constitution Order of 1950.

In pursuance of the above provisions of the Constitution, the President made the Constitution (Application to Jammu & Kashmir) Order, 1950, in consultation with the Government of the State of Jammu & Kashmir, specifying the matters with respect to which the Union Parliament would be competent to make laws for Jammu & Kashmir, relating to the three subjects of Defence, Foreign Affairs and Communications with respect to which Jammu & Kashmir had acceded to India.

Subsequent Orders.

Next, there was an Agreement between the Government of India and of the State at Delhi in June, 1952, as to the subjects over which the Union should have jurisdiction over the State, pending the decision of the Constituent Assembly of Jammu & Kashmir. The Constituent Assembly of Jammu & Kashmir ratified the Accession to India and also the decision arrived at by the Delhi Agreement as regards the future relationship of the State with India, early in 1954. In pursuance of this, the President, in consultation with the State Government, made the *Constitution (Application to Jammu & Kashmir), Order, 1954,* which came into force on the 14th of May, 1954. This Order implemented the Delhi Agreement as ratified by the Constituent Assembly and also superseded the Order of 1950. According to this Order, in short, the jurisdiction of the Union extended to *all* Union subjects under the Constitution of India (subject to certain slight alterations) instead of only the three subjects of Defence, Foreign Affairs and Communications with respect to which the State had acceded to India in 1947. This Order, as amended in 1963, 1964, 1965, 1966, 1972, 1974 and 1986, deals with the entire constitutional position of the State within the framework of the Constitution of India, excepting only the internal constitution of the State Government, which was to be framed by the Constituent Assembly of the State.[4]

Making of the State Constitution.

It has already been explained how from the beginning it was declared by the Government of India that, notwithstanding the Accession of the State of Jammu & Kashmir to India by the then Ruler, the future Constitution of the State as well as its relationship with India were to be finally determined by an elected Constituent Assembly of the State. With these objects in view, the people of the State elected a sovereign Constituent Assembly which met for the first time on October 31, 1951.

The Constitution (Application to Jammu & Kashmir) Order, 1954, which settled the constitutional relationship of the State of Jammu & Kashmir, did not disturb the previous assurances as regards the framing of the *internal* Constitution of the State by its own people. While the

Constitution of the other Part B States was laid down in Part VII of the Constitution of India (as promulgated in 1950), the State Constitution of Jammu & Kashmir was to be framed by the Constituent Assembly of that State. In other words, the provisions governing the Executive, Legislature and Judiciary of the State of Jammu & Kashmir were to be found in the Constitution drawn up by the people of the State and the corresponding provisions of the Constitution of India were not applicable to that State.

The first official act of the Constituent Assembly of the State was to put an end to the hereditary princely rule of the Maharaja. It was one of the conditions of the acceptance of the accession by the Government of India that the Maharaja would introduce popular Government in the State. In pursuance of this understanding, immediately after the Accession, the Maharaja invited Sheikh Mohammad Abdullah, President of the All Jammu & Kashmir National Conference, to form an interim Government, and to carry on the administration of the State. The interim Government later changed into a full-fledged Cabinet, with Sheikh Abdullah as the first Prime Minister. The Abdullah Cabinet, however, would not rest content with anything short of the abdication of the ruling Maharaja Sir Hari Singh. In June 1949, thus, Maharaja Hari Singh was obliged to abdicate in favour of his son Yuvaraj Karan Singh. The Yuvaraj was later *elected* by the Constituent Assembly of the State (which came into existence on October 31, 1951) as the '*Sadar-i-Riyasat*'. Thus, came to an end the princely rule in the State of Jammu & Kashmir and the head of the State was henceforth to be an elected person. The Government of India accepted this position by making a Declaration of the President under Art. 370(3) of the Constitution (15th November, 1952) to the effect that for the purposes of the Constitution, 'Government' of the State of Jammu & Kashmir shall mean the *Sadar-i-Riyasat* of Jammu & Kashmir, acting on the advice of the Council of Ministers of the State. Subsequently, however, the name of *Sadar-i-Riyasat* has been changed to that of Governor.

We have already seen that in February, 1954, the Constituent Assembly of Jammu & Kashmir ratified the State's Accession to India, thus fulfilling the moral assurance given in this behalf by the Government of India, and also that this act of the Constituent Assembly was followed up by the promulgation by the President of India of the Constitution (Application to Jammu & Kashmir) Order, 1954, placing on a final footing the applicability of the provisions of the Constitution of India governing the relationship between the Union and this State.

The making of the State Constitution for the internal governance of the State was now the only task left to the Constituent Assembly. As early as November, 1951, the Constituent Assembly had made the Jammu & Kashmir Constitution (Amendment) Act, which gave legal recognition to the transfer of power from the hereditary Maharaja to the popular Government headed by an elected *Sadar-i-Riyasat*. For the making of the permanent Constitution of the State, the Constituent Assembly set up several Committees and in October, 1956, the Drafting Committee presented the Draft Constitution, which after discussion, was finally adopted on November 17, 1957, and given effect to from *January 26, 1957*. The State of Jammu & Kashmir thus acquired the distinction of having a *separate Constitution for the* *administration of the State*, in place of the provisions of Part VI of the Constitution of India which govern all the other State of the Union.[5]

Important provisions of the State Constitution.

The more important provisions of the State Constitution of Jammu & Kashmir (as amended up to 1984) are as follows:

The Constitution declares the State of Jammu and Kashmir to be "an integral part of Union of India".

The territory of the State will comprise all the territories, which, on August 15, 1947, were under the sovereignty or suzerainty of the Ruler of the State (*i.e.,* including the Pakistan-occupied area of Jammu & Kashmir). This provision is immune from amendment.

The executive and legislative power of the State will extend to all matters except those with respect to which Parliament has powers to make laws for the State under the provisions of the Constitution of India.

Every person who is, or is deemed to be, a citizen of India shall be a permanent resident of the State, if on the 14th of May, 1954, he was a State subject of Class I or Class II, or, having lawfully acquired immovable property in the State, he has been ordinarily resident in the State for not less than 10 years prior to that date. Any person who, before the fourteenth day of May, 1954, was a State subjet of Class I or of Class II and who, having migrated after the first day of March, 1947, to the territory now included in Pakistan, returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authroity of any law made by the State Legislature will on such return be a permanent resident of the State.[6] The permanent residents will have all rights guaranteed to them under the Constitution of India [s. 10].

Under the original Constitution of Jammu & Kashmir, there was a difference between this State and other States of India as regards the Head of the State Government. While in the rest of India, the head of the State Executive was called 'Governor' and he is appointed by the President [*Arts.* 152, 155], the Executive head of the State of Jammu & Kashmir was called *Sadar-i-Riyasat* and he was to be elected by the State Legislative Assembly. This anomaly has, however, been removed by the Constitution of Jammu & Kashmir (6th Amendment) Act, 1965, as a result of which the nomenclature has been changed from *Sadar-i-Riyasat* to 'Governor' and he is to be 'appointed by the President under his hand and seal' [ss. 26-27] as in other States [*Art.* 155]. In the result, there is now *no differences on this point*, between Jammu & Kashmir and other States. As in other States, the executive power of the State will be vested in the Governor and shall be exercised by him with the advice of the Council of Ministers (except in the matter of appointment of the Chief Minister [s. 36] and of issuing a Proclamation for introducing 'Governor's Rule' in case of breakdown of constitutional machinery [s. 92]). The Governor will hold office for a term of five years. The Council of Ministers, headed by the Chief Minister, will be collectively responsible to the Legislative Assembly.

The Legislature of the State will consist of the Governor and two Houses, to be known respectively as the Legislative Assembly and the

Legislative Council. The Legislative Assembly will consist of one hundred members chosen by direct election from territorial constituencies in the State; and two women members nominated by the Governor. Twenty-four seats in the Legislative Assembly will remain vacant to be filled by representatives of people living in Pakistan-occupied areas of the State. The Legislative Council will consist of 36 members. Eleven members will be elected by the members of the Legislative Assembly from amongst persons who are residents of the Province of Kashmir, provided that of the members so elected at least one shall be a resident of Tehsil Ladakh and at least one a resident of Tehsil Kargil, the two outlying areas of the State. Eleven members will be elected by the members of the Legislative Assembly from amongst persons who are residents of the Jammu Province. The remaining 14 members will be elected by various electorates, such as municipal councils, and such other local bodies.

The High Court of the State will consist of a Chief Justice and two or more other Judges. Every Judge of the High Court will be appointed by the President after consultation with the Chief Justice of India and the Governor, and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court.

There will be a Public Service Commission for the State. The Commission along with its Chairman will be appointed by the Governor.

Every member of the civil service or one holding a civil post will hold office under the pleasure of the Governor.

The official language of the State will be Urdu, but English will, unless the Legislature by law otherwise provides, continue to be used for all official purposes of the State [s. 145.]

The State Constitution may be amended by introducing a Bill in the Legislative Assembly and getting it passed in each House by a majority of not less than two-thirds of the total membership of that House. But no Bill or amendment seeking to make any change in the provisions relating to the relationship of the State with the Union of India, the extent of executive and legislative powers of the State or the provisions of the Constitution of India as applicable in relation to the State shall be introduced or moved in either House of the Legislature [s. 147].

Indira-Abdullah Agreement of 1975.

Notwithstanding the liberal measures introduced in the State by the adoption of a separate State Constitution, the pro-Pakistani elements in Jammu & Kashmir continued their agitation for the holding of a plebiscite to finally determine whether the State should accede to India or Pakistan and there were violent incidents initiated by the 'Plebiscite Front',—a pro-Pakistani party which had been formed with the avowed object of secession from India. Sheikh Abdullah got involved in these anti-Indian movements and went on criticising the Indian policy towards the State, as a result of which he had to be placed under preventive detention in 1955. After a short release in 1964 on the profession of a changed attitude, he again went wrong, so that he was again detained in 1965 under the D.I.R., and eventually externed from the State in 1971. This was followed by a period of blowing hot and cold, leading to a series of negotiations between the representatives of India and the Plebiscite Front, and an agreement was eventually reached and announced, on February 24, 1975.[7]

The net political result of this Agreement was that the demand for plebiscite was abandoned by Abdullah and his followers and, on the other hand, it was agreed that the special status of the State of Jammu & Kashmir would continue to remain under the provisions of Art. 370 of the Constitution of India, which was described as a 'temporary' measure, in the original Constitution. A halt was, thus, cried to the progress of integration of this State with the Union of India, which had started in 1954, by giving larger autonomy to the State Assembly in certain matters.

It should, however, be mentioned that owing to differences over matters arising out of the Agreement, it has *not* been implemented by issuing a fresh Presidential Order under Art. 370.[4]

The salient features of the constitutional position of the State of Jammu & Kashmir in relation to the Union, as modified up-to-date, may now be summarised.

(a) *Jurisdiction of Parliament.* The jurisdiction of Parliament in relation to Jammu & Kashmir shall be confined to the matters enumerated in the Union List, and the Concurrent List,[8] subject to certain modifications, while it shall have no jurisdiction as regards most of the matters enumerated in the Concurrent List. While in relation to the other States, the residuary power of legislation belongs to Parliament, in the case of Jammu & Kashmir, the residuary power shall belong to the Legislature of that State, excepting certain matters, specified in 1969, for which Parliament shall have exclusive power, e.g., prevention of activities relating to cession or secession, or disrupting the sovereignty or integrity of India. The power to legislate with respect to preventive detention in Jammu & Kashmir, under Art. 22(7), shall belong to the Legislature of the State instead of Parliament, so that no law of preventive detention made by Parliament will extend to that State.

Recapitulation of the Constitutional position of Jammu & Kashmir *vis-a-vis* the Union.

By the Constitution (Application to Jammu & Kashmir) Order, 1986, however, Art. 249 has been extended to the State of Jammu & Kashmir, so that it would now be competent to extend the jurisdiction of Parliament to that State, in the national interest (e.g., for the protection of the borders of the State from aggression from Pakistan or China), by passing a resolution in the Council of States [Constitution Order, 129].

(b) *Autonomy of the State in certain matters.* The plenary power of the Indian Parliament is also curbed in certain other matters, with respect to which Parliament cannot make any law without the consent of the Legislature of the State of Jammu & Kashmir, where that State is to be affected by such legislation, *e.g.,* (i) alteration of the name or territories of the State [*Art. 3*], (ii) international treaty or agreement affecting the disposition of any part of the territory of the State [*Art. 253*].

Similar fetters have been imposed upon the executive power of the Union to safeguard the autonomy of the State of Jammu & Kashmir, a privilege which is not enjoyed by the other States of the Union. Thus,

(i) Similarly, no decision affecting the disposition of the State can be made by the Government of India, without the consent of the Government of the State.

(ii) The Union shall have *no* power to suspend the Constitution of the State on the ground of failure to comply with the directions given by the Union under Art. 365.

(iii) Arts. 356-357 relating to suspension of constitutional machinery have been extended to Jammu & Kashmir by the Amendment Order of 1964. But "failure" would mean failure of the constitutional machinery as set up by the Constitution of Jammu & Kashmir and not Part VI of the Constitution of India.

In Jammu & Kashmir two types of Proclamations are made: (a) the "Governor's Rule" under s. 92 of the Constitution of Jammu & Kashmir, and (b) the "Presidents Rule" under Art. 356 as in the case of other States.

(a) The first occasion when President's Rule was imposed in Jammu & Kashmir was on 7-9-1986. It followed Governor's Rule which expired on 6-9-1986. The Proclamation was revoked on 6-11-1986 when Farooq Abdullah formed a ministry.

(b) Governor's Rule was imposed on 27-3-1977 for the first time and later on 19-1-1990.

Since 19-7-1990 the State had continuously been under President's Rule until 9-10-1996 when a popular Government, under the leadership of Farooq Abdullah, was formed on the basis of an election held in September, 1996 [*Statesman,* 10-10-1996].

Governor's Rule is provided by the State Constitution. In exercise of this power the Governor has the power, with the concurrence of the President, to assume to himself all or any of the functions of the Government of the State, except those of the High Court.

(iv) The Union shall have no power to make a Proclamation of Financial Emergency with respect to the State of Jammu & Kashmir under Art. 360.

In other words, the federal relationship between the Union and the State of Jammu & Kashmir respects 'State rights' more than in the case of the other States of the Union.

(c) *Fundamental Rights and the Directive Principles.* The provisions of Part IV of the Constitution of India relating to the Directive Principles of State Policy do *not* apply to the State of Jammu & Kashmir. The provisions of Art. 19 are subject to special restrictions for a period of 25 years. Special rights as regards employment, acquisition of property and settlement have been conferred on 'permanent residents' of the State, by inserting a *new* Art. 35A. Articles 19(1)(f) and 31(2) have *not* been omitted, so that the fundamental right to property is still guaranteed in this State.

(d) *Separate Constitution for the State.* While the Constitution for any of the other States of the Union of India is laid down in Part VI of the Constitution of India, the State of Jammu & Kashmir has its own

Constitution (made by a separate Constituent Assembly and promulgated in 1957).

(e) *Procedure for Amendment of State Constitution.* As already stated, the provisions of Art. 368 of the Constitution of India are not applicable for the amendment of the State Constitution of Jammu & Kashmir. While an Act of Parliament is required for the amendment of any of the provisions of the Constitution of India, the provisions of the State Constitution of Jammu & Kashmir (excepting those relating to the relationship of the State with the Union of India) may be amended by an Act of the Legislative Assembly of the State, passed by a majority of not less than two-thirds of its membership; but if such amendment seeks to affects the Governor or the Election Commission, it shall have no effects unelss the law is reserved for the consideration of the President and receives his assent.

It is also to be noted that no amendment of the Constitution of India shall extend to Jammu & Kashmir unless it is extended by an Order of the President under Art. 370(1).

(f) No alteration of the area or boundaries of this State can be made by Parliament without the consent of the Legislature of the State of Jammu & Kashmir.

(g) *Other Jurisdictions.* By amendments of the Constitution Order, the jurisdictions of the Comptroller and Auditor-General, of the Election Commission, and the Special Leave Jurisdiction of the Supreme Court have been extended to the State of Jammu & Kashmir.

Power to put an end to Art. 370. Clause (3) of Art. 370 provides—

> "Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:
>
> Provided that the recommendation of the Constiuent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification."

Recently, a plea has been raised by the Bharatiya Janata Party that the President should declare that Art. 370 shall cease to operate, so that the special status of J & K would be abolished and that State would be brought to the same level as that of the other States, to be governed by all the provisions of Part VI of the Constitution.

Since the Constituent Assembly, referred to in the Proviso to Cl. (3) [*above*] no longer exists, the President's power appears to be unfettered now. The arguments of the B.J.P. to abolish the special status are—

(a) The makers of the Constitution of India intended that the special status was granted to J. & K. only as a temporary measure, and that is why Art. 370 was included in Part XXI under the label—'Temporary, Transitional and Special Provisions', and Cl. (3) was appended to Art. 370.

(b) The people of J. & K. have abused the special status and entered into a conspiracy with the Government of Pakistan and the leaders of 'Pakistan-occupied Kashmir' to invite a veiled invasion from Pakistan.

The Congress Government has so far resisted the demand of the B.J.P. on *political* grounds. History only can say what would happen if and when the B.J.P. ever gains a position of predominance.

REFERENCES

1. *Vide White Paper on Indian States* (MS. 6) rule pp. 111, 165.
2. Vide Author's *Commentary on the Constitution of India*, 5th Ed., Vol. 4, p. 38.
3. Sections 5-6 of the Government of India Act, 1935, read with s. 7(1)(b) of the Indian Independence Act, 1947.
4. As to the Constitution of Jammu & Kashmir see pp. 27ff. of Author's *Commentary on The Constitution of India*, 6th Ed., Vol. P. Momemntious other changes were proposed to be introduced after the agreement arrived at between the Government of India and Sheikh Abdullah, in February, 1975. But this agreement could not be implemented owing to difference in matter of detail (see also f.n. 8, below.)
5. The very definition of 'State' (in Art. 152) for the purpose of Part VI excludes the State of Jammu & Kashmir.
6. Their position is sought to be drastically changed by a Resettlement Bill passed by the Jammu & Kashmir Legislature, which has been *referred* by the President to the Supreme Court of India for its opinion as to its constitutional validity.
7. *Vide Statesman*, Calcutta, 25-2-1975, pp. 1, 7. He was released shortly after this Agreement and made the Chief Minister in February, 1975, on the resignation of the Mir Qasim ministry. At the election held in July, 1975, Sheikh Abdullah was elected to the Jammu & Kashmir Assembly and his Chief Ministership was thus upheld by election. He was retaining that office till his death in 1982.
8. Until the amendment of the Order in 1963, the Concurrent List was altogether inapplicable to Jammu & Kashmir. Its application has been extended by the Amendment Order of 1964, subject to exceptions introduced in 1972.

PART IV

Administration of Union Territories

CHAPTER 16

ADMINISTRATION OF UNION TERRITORIES AND ACQUIRED TERRITORIES

Genesis of Union Territories.

AS stated earlier, in the original Constitution of 1949, States were divided into three categories and included in Parts A, B and C of the First Schedule of the Constitution.

Part C States were 10 in number, namely,—Ajmer, Bhopal, Bilaspur, Coorg, Delhi, Himachal Pradesh, Kutch, Manipur, Tripura and Vindhya Pradesh. Of these, Himachal Pradesh, Bhopal, Bilaspur, Kutch, Manipur, Tripura and Vindhya Pradesh had been formed by the integration of some of the smaller Indian States. The remaining States of Ajmer, Coorg and Delhi were Chief Commissioner's Provinces under the Government of India Acts, 1919 and 1935, and were thus administered by the Centre even before the Constitution.

The special feature of these Part C States was that they were administered by the President through a Chief Commissioner or a Lieutenant-Governor, acting as his agent. Parliament had legislative power relating to *any* subject as regards the Part C States, but the Constitution empowered Parliament to create a Legislature as well as a Council of Advisers or Ministers for a Part C State. In exercise of this power, Parliament enacted the Government of Part C States Act, 1951, by which a Council of Advisers or Ministers was set up in each Part C State, to advise the Chief Commissioner, under the overall control of the President, and also a Legislative Assembly to function as the Legislature of the State, without derogation to the plenary powers of Parliament.

In place of these Part C States, the Constitution (7th Amendment) Act, 1956 substituted the category of 'Union Territories' which are also similarly administered by the Union. As a result of the reorganisation of the States by the States Reorganisation Act, 1956, the Part C States of Ajmer, Bhopal, Coorg, Kutch, and Vindhya Pradesh were merged into other adjoining States.

Union Territories.

The list of Union Territories, accordingly, included the remaining Part C States of Delhi; Himachal Pradesh[1] (which included Bilaspur); Manipur; and Tripura.[1] To these were added the Andaman and Nicobar Islands; and the Laccadive and Amindivi Islands. Under the original Constitution, the Andaman and Nicobar Islands were included in Part D of the First Schedule. The Laccadive, Minicoy and

Amindivi Islands (renamed '*Lakshadweep*' in 1973), on the other hand, were included in the territory of the State of Madras. The States Reorganisation Act and the Constitution (7th Amendment) Act, 1956 abolished Part D of the 1st Schedule and constituted it a separate Union Territory.

By the Constitution (Tenth, Twelfth, Fourteenth and Twenty-seventh) Amendment Acts, some others were added to the list of Union Territories.

Since some of the erstwhile Union Territories (Himachal Pradesh, Manipur, Tripura, Mizoram, Arunachal Pradesh[1] and Goa) have been lifted up into the category of 'States', the number of Union Territories is, at the end of 2000, *seven*[1] [see Table III, *post*].

Though all these Union Territories belong to one category, there are some differences in the actual system of administration as between the several Union Territories owing to the provisions of the Constitution as well as of Acts of Parliament which have been made in pursuance of the Constitutional provisions.

Administrator.

Article 239(1) provides that save as otherwise provided by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an Administrator to be appointed by him with such designation as he may specify.[2] Instead of appointing an Administrator from outside, the President may appoint the Governor of a State as the Administrator of an adjoining Union Territory; and where a Governor is so appointed, he shall exercise his functions as such Administrator independently of his Council of Ministers [*Art.* 239(2)].

All the Union Territories are thus administered by an Administrator as the agent of the President and not by a Governor acting as the head of a State.

Provision for Legislative Assembly and Council of Ministers.

In 1962, however, Art. 239A (amended by the 37th Amendment, 1974) was introduced in the Constitution, to empower Parliament to create a Legislature or Council of Ministers or both for some of the Union Territories. By virtue of this power, Parliament enacted the Government of Union Territories Act, 1963, providing for a Legislative Assembly as well as a Council of Ministers to advise the Administrator, in these Union Territories. Pondicherry alone is now left in this category, all other Union Territories have become States.

On 1-2-1992, Arts. 239AA and 239AB (inserted by Constitution 69th Amendment) came into force. To supplement these provisions the Government of National Capital Territory of Delhi Act, 1991 was enacted. Delhi has from 1993 a Legislative Assembly and a Council of Ministers. The Government of Delhi has all the legislative powers in the State List excepting entries 1 (Public Order), 2 (Police) and 18 (Land).

Legislative Power.

Parliament has exclusive legislative power over a Union Territory, including matters which are enumerated in the State List [*Art.* 246(4)]. But so far as the two groups of Island Territories, Dadra and Nagar Haveli; Daman and Diu; Pondicherry; are concerned, the President has got a legislative power, namely, to make regulations for the peace, progress and good government of these Territories. This power of the President overrides the legislative power of Parliament inasmuch as a regulation made by the President as regards these Territories may repeal or amend any Act of Parliament which is for the time being applicable to the Union Territory [*Art.* 240(2)]. But the President's power to make regulations shall remain suspended *while* the Legislature is functioning in any of these States,—to be revived as soon as such Legislature is dissolved or suspended.

President's Power to make Regulations as regards the Andaman & Nicobar Islands; *Lakshadweep* and other Islands.

Parliament may by law constitute a High Court for a Union Territory or declare any court in any such Territory to be a High Court for all or any of the purposes of this Constitution [*Art.* 241]. Until such legislation is made the existing High Courts relating to such territories shall continue to exercise their jurisdiction. In the result, the Punjab and Haryana High Court acts as the High Court of Chandigarh; the *Lakshadweep* is under the jurisdiction of the Kerala High Court; the Calcutta High Court has got jurisdiction over the Andaman and Nicobar Islands [*vide* Table XVI], the Madras High Court has jurisdiction over Pondicherry; the Bombay High court over Dadra and Nagar Haveli; and the Gauhati High Court (Assam) over Mizoram and Arunachal Pradesh. The Territory of Goa, Daman and Diu had a Judicial Commissioner but recently the jurisdiction of the Bombay High Court has been extended to this Territory. Delhi has a separate High Court of its own since 1966.

High Courts for Union Territories.

There are no separate provisions in the Constitution relating to the administration of Acquired Territories but the provisions relating to Union Territories will extend by virtue of ther definition of 'Union Territory' [*Art.* 366(30)], as including "any other territory comprised within the territory of India but not specified in that Schedule". Thus, the Territory of Pondicherry, Karaikal, Yanam and Mahe, was being administered by the President of India through a Chief Commissioner until it was made a Union Territory, in 1962. Parliament has plenary power of legislation regarding such territory as in the case of the Union Territories [*Art.* 246(4)].

Acquired Territories.

REFERENCES

1. Himachal Pradesh has since been transferred to the category of States, by the State of Himachal Pradesh Act, 1970, and Manipur and Tripura, by the N.E. Areas (Reorganisation) Act, 1971. Similarly, by the State of Mizoram Act, 1986, the State of Arunachal Pradesh Act, 1986 and the Goa, Daman and Diu Reorganisation Act, 1987, the Union Territories of Mizoram, Arunachal Pradesh and Goa have been elevated to Statehood.
2. Heterogeneous designations have been specified by the President in the case of the different Union Territories:
   (a) Administrator—Chandigarh, Dadra & Nagar Haveli, Daman & Diu, Lakshadweep.
   (b) Lieutenant Governor—Delhi; Pondicherry; Andaman and Nicobar Islands.

PART V

Local Government

CHAPTER 17

THE NEW SYSTEM OF PANCHAYATS AND MUNICIPALITIES

History.

THE village *Panchayat* was a unit of local administration since the early British days, but they had to work under Government control. When Indian leaders pressed for local autonomy at the national level, the British Government sought to meet this demand by offering concession at the lowest level, at the initial stage, by giving powers of self-government to Panchayats in rural area and municipalities in urban areas, under various local names under different enactments, *e.g.* the Bengal Local Self-Government Act, 1885; the Bengal Village Self-Government Act, 1919; the Bengal Municipal Act, 1884.

In the Government of India Act, 1935, the power to enact legislation was specifically given to the Provincial Legislature by Entry 12 in the Provincial Legislative List. By virtue of this power, new Acts were enacted by many other States vesting powers of administration, including criminal justice, in the hands of the Panchayats.

Notwithstanding such existing legislation, the makers of the Constitution of Independent India were not much satisfied with the working of these local bodies as institutions of popular government and, therefore, a Directive was included in the Constitution of 1949 in Art. 40 as follows:

> "The state shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government."

But notwithstanding this Directive in Art. 40, not much attention was given to hold elections in these local units as a unit of representative democracy in the country as a whole. During the time of Mr. Rajeev Gandhi it was considered necessary to further the organisation of these local units by inserting specific provisions in the Constitution itself on the basis of which the Legislatures of the various States might enact detailed laws according to the guidelines provided by the Constitutional provisions.

The 73rd and 74th Constitution Amendment Acts.

The ideas so evolved, culminated in the passing of Constitution 73rd and 74th Amendment Acts, 1992 which inserted Parts IX and IX-A in the Constitution. While Part IX relates to the Panchayats, containing Arts. 243 to 243-O, Part IXA relates to the Municipalities, containing Arts. 243P to 243ZG. The provisions in Parts IX and IXA are more or less parallel or analogous.

Special features of the new system.

Before entering into details, it may be pointed out that new system contained certain novel provisions, for example, direct election by the people in the same manner as at the Union and State levels; reservation of seats for women; an Election Commission to conduct election, a Finance Commission to ensure financial viability of these institutions.

Another striking feature is that the provisions inserted in the Constitution by Arts. 243-243ZG are in the nature of basic provisions which are to be supplemented by laws made by the respective State Legislatures, which will define the details as to the powers and functions of the various organs, just mentioned.

It is to be recalled that 'local Government' including self-Government institutions in both urban and rural areas is an exclusive State subject under Entry 5 of List II of the 7th Sch., so that the Union cannot enact any law to create rights and liabilities relating to these subjects. What the Union has, therefore, done is to outline the scheme which would be implemented by the several States by making laws, or amending their own existing laws to bring them in conformity with the provisions of the 73rd and 74th Constitution Amendment Acts.

After implementing legislation was enacted by the States, elections have taken place in most of the States and the Panchayats and Municipalities have started functioning under the new law. These amendments do not apply to Jammu & Kashmir, Meghalaya, Mizoram, Nagland and National Capital Territory of Delhi.

[See, further, under Chap. 34—How the Constitution has worked, *post*].

CHAPTER 18

PANCHAYATS

3-tier system.

PART IX of the Constitution envisages a three-tier system of Panchayats,[1] namely, (a) The village level; (b) The District Panchayat at the district level; (c) The Intermediate Panchayat which stands between the village and district Panchayats in the States where the population is above 20 lakhs.

Composition.

All the seats in a Panchayat shall be filled by persons chosen by direct election from territorial constituencies in the Panchayat area. The electorate has been named 'Gram Sabha' consisting of persons registered in the electoral rolls relating to a village comprised within the area of a Panchayat. In this way representative democracy will be introduced at the grass roots.

The Chairperson of each Panchayat shall be elected according to the law passed by a State and such State Law shall also provide for the representation of Chairpersons of Village and Intermediate Panchayats in the District Panchayat, as well as members of the Union and State Legislature in the Panchayats above the village level.

Reservation of seats for Scheduled Castes and Scheduled Tribes.

Article 243D provides that seats are to be reserved for (a) Scheduled Castes, and (b) Scheduled Tribes. The reservation shall be in proportion to their population. If, for example, the Scheduled Castes constitute 30% of the population and the Scheduled Tribes 21%, then 30% and 21% seats shall be reserved for them respectively.

Out of the seats so reserved not less than 1/3rd of the seats shall be reserved for women belonging to Scheduled Castes and Scheduled Tribes, respectively.

Reservation for women.

Not less 1/3rd of the total number of seats to be filled by direct elections in every Panchayat shall be reserved for women.

Reservation of offices of Chairpersons.

A State may by law make provision for similar reservation of the offices of Chairpersons in the Panchayats at the village and other levels.

These reservations favouring the Scheduled Castes and Tribes shall cease to be operative when the period specified in Art. 334 (at present 60 years *i.e.*, upto 24-1-2010).

A State may by law also reserve seats or offices of Chairpersons in the Panchayat at any level in favour of backward classes of citizens.

Duration of Panchayat.

Every Panchayat shall continue for five years from the date of its first meeting. But it can be dissolved earlier in accordance with the procedure prescribed by State law. Elections must take place before the expiry of the above period. In case it is dissolved earlier, then the elections must take place within six months of its dissolution. A Panchayat reconstituted after premature dissolution (*i.e.* before the expiry of the full period of five years) shall continue only for the remainder of the period. But if the remainder of the period is less than six months it shall not be necessary to hold elections.

Qualification for membership.

Article 243F provides that all persons who are qualified to be chosen to the State Legislature shall be qualified to be chosen as a member of a Panchayat. The only difference is that a person who has attained the age of 21 years will be eligible to be a member (in case of State Legislature the prescribed age is 25 years—Art. 173). If a question arises as to whether a member has become subject to any disqualification, the question shall be referred to such authority as the State Legislature may provide by law.

Powers, authority and responsibilities of Panchayats.

State Legislatures have the legislative power, to confer on the Panchayats such powers and authority as may be necessary to enable them to function as institutions of self-government [*Arts.* 243G-243H]. They may be entrusted with the responsibility of (a) preparing plans for economic development and social justice, (b) implementation of schemes for economic development and social justice, and (c) in regard to matters listed in the Eleventh Schedule (inserted by the 73rd Amendment). The list contains 29 items, *e.g.*, land improvement, minor irrigation, animal husbandry, fisheries, education, women and child development etc. The 11th Sch. thus distributes powers between the State Legislature and the Panchayat just as the 7th Sch. distributes powers between the Union and the State Legislature.

Powers to impose taxes and financial resources.

A State may by law authorise a Panchayat to levy, collect and appropriate taxes, duties, tolls etc. The law may lay down the procedure to be followed as well as the limits of these exactions. It can also assign to a Panchayat various taxes, duties etc. collected by the State Government. Grants-in-aid may be given to the Panchayats from the Consolidated Fund of the State.

Panchayat Finance Commissions.

Within one year from 25th April 1993, *i.e.* the date on which the Constitution 73rd Amendment came into force and afterwards every five years the State Government shall appoint a Finance Commission to review the financial position of the Panchayats and to make recommendations as to—

(a) the distribution between the State and the Panchayats of the net proceeds of taxes, duties, tolls and fees leviable by the State which may be divided between them and how allocation would be made among various levels of Panchayats;

(b) what taxes, duties, tolls and fees may be assigned to the Panchayats;

(c) grant-in-aid to the Panchayats.

The report of the Commission, together with a memorandum of action taken on it, shall be laid before the State Legislature. These provisions are modelled on Art. 280 which contains provisions regarding appointment of a Finance Commission for distribution of finances between the Union and the States.

State Election Commission.

Article 243K is designed to ensure free and fair elections to the Panchayats.

Article 243K provides for the Constitution of a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor. Powers of superintendence, direction and control of elections to the Panchayats, including preparation of electoral rolls for it shall vest in the State Election Commission. To ensure the independence of the Commission it is laid down that State Election Commissioner can be removed only in the same manner and on the same grounds as a Judge of a High Court. The State Legislatures have the power to legislate on all matters relating to elections to Panchayats.

Bar to interference by Courts in electoral matters.

As under Art. 329, courts shall have no jurisdiction to examine the validity of a law, relating to delimitation of constituencies or the allotments of seats, made under Art. 243K. An election to a Panchayat can be called in question only by an election petition which should be presented to such authority and in such manner as may be prescribed by or under any law made by the State Legislature.

REFERENCES

1. For the text of the 73rd Amendment Act relating to Panchayats [*Arts.* 243-243-O], see Author's *Constitution Amendment Acts*, 7th Ed. pp. 170-77; *Shorter constitution of India*, 14th Ed., 2008.

CHAPTER 19

MUNICIPALITIES AND PLANNING COMMITTEES

PART IXA which has come into force on 1-6-1993 gives a constitutional foundation to the local self-government units in urban areas. In fact such institutions are in existence all over the country.

Some of the provisions are similar to those contained in Part IX, *e.g.* Reservation of Seats, Finance Commission, Election Commission etc.

This part gives birth to two types of bodies:

(i) Institutions of self-government [*Art.* 243Q], and

(ii) Institutions for planning [*Arts.* 243ZX and 243 ZE].

Institutions of self-government, called by a general name "municipalities" are of three types:

(a) Nagar Panchayat, for a transitional area, *i.e.* an area which is being transformed from a rural area to an urban area.

(b) Municipal Council for a smaller urban area.

(c) Municipal Corporation for a larger urban area.

Article 243Q makes it obligatory for every State to constitute such units. But if there is an urban area or part of it where municipal services are being provided or proposed to be provided by an industrial establishment in that area then considering also the size of the area and other factors the Governor may specify it to be an industrial township. For such an area it is not mandatory to constitute a Municipality.

Composition of Municipalities.

The members of a municipality would generally be elected by direct election. The Legislature of a State may by law provide for representation in a municipality of (i) persons having special knowledge or experience in municipal administration, (ii) Members of Lok Sabha, State Assembly, Rajya Sabha and Legislative Council, and (iii) the Chairpersons of Committees constituted under Cl. (5) of Art. 243S. The Chairperson shall be elected in the manner provided by the Legislature.

Wards Committee.

For one or more wards comprised within the territorial area of a municipality having a population of three lacs or more it would be obligatory to constitute Ward Committees. The State Legislature shall make provision with respect to its composition, territorial area and the manner in which the seats in a ward committee shall be filled.

Other Committees.

It is open for the State Legislature to constitute Committees in addition to the wards committees.

Reservations of seats for Scheduled Castes and Scheduled Tribes.

As in Part IX reservations of seats are to be made in favour of the Scheduled Castes and Scheduled Tribes in every Municipality.

Reservation for women.

Out of the total number of seats to be filled by direct elections at least 1/3rd would be reserved for women. This includes the quota for women belonging to Scheduled Castes and Tribes.

Reservation of offices of Chairpersons.

It has been left to the State legislature to prescribe by law the manner of reservation of the offices of the Chairpersons of Municipalities.

All reservations in favour of Scheduled Castes and Tribes shall come to an end with the expiry of the period specified in Art. 334.

It is permissible for a State Legislature to make provisions for reservation of seats or offices of Chairpersons in favour of backward classes.

Duration of Municipalities.

Every Municipality shall continue for five years from the date of its first meeting. But it may be dissolved earlier according to law. Article 243Q further prescribes that before dissolution a reasonable opportunity of being heard must be given to the municipality. Elections to constitute a Municipality shall be completed before the expiry of the period of five years. If the Municipality has been superseded before the expiry of its term, the elections must be completed within six months of its dissolution. A Municipality constituted after its dissolution shall continue only for the remainder of the term. But if the remainder of the period is less than six months it shall not be necessary to hold elections.

It has been provided that no amendment of the law in force shall cause dissolution of a Municipality before the expiry of the five years term.

Qualification for membership.

Article 243V lays down that all persons who are qualified to be chosen to the State legislature shall be qualified for being a member of a Municipality. There is an important difference. Persons who have attained the age of 21 years will be eligible to be a member. While the constitutional requirement is that for election to the State legislature of a State a person must have attained the age of 25 years [*Art.* 173].

Powers, authority and responsibilities of Municipalities.

Legislatures of States have been conferred the power [*Art.* 243W] to confer on the Municipalities all such powers and authority as may be necessary to enable them to function as institutions of self-government. It has specifically been mentioned that they may be given the responsibility of (a) preparation of plans for economic development and social justice, (b) implementation of schemes as may be entrusted to them, and (c) in regard to matters listed in the 12th schedule. This schedule contains 18 items, *e.g.* Urban Planning, Regulation of Land Use, Roads and

Bridges, Water Supply, Public Health, Fire Services, Urban Forestry, Slums, etc.

Power to impose taxes and financial resources.

A State Legislature may by law authorise a Municipality to levy, collect and appropriate taxes, duties, tolls etc. The law may lay down the limits and prescribe the procedure to be followed. It can also assign to a Municipality various taxes, duties etc. collected by the State Government. Grants-in-aid may be given to the Municipalities, from the Consolidated Fund of the State.

Panchayat Finance Commission.

The Finance Commission appointed under Art. 243-I (see Chap. 18 under Panchayat Finance Commission) shall also review the financial position of the Municipalities and make recommendations as to—

(a) the distribution between the State and the Municipalities of the net proceeds of taxes, duties, tolls and fees leviable by the State which may be divided between them and allocation of shares amongst different levels of Municipalities.

(b) the taxes, duties, tolls and fees that may be assigned to the Municipalities.

(c) grants-in-aid to the Municipalities.

(d) the measures needed to improve the financial position of the Municipalities.

(e) any other matter that may be referred to it by the Governor.

Elections to Municipalities.

The State Election Commission appointed under Art. 243K shall have the power of superintendence, direction and control of (i) the preparation of electoral rolls for, and (ii) the conduct of all elections to the Municipalities. State Legislatures have been vested with necessary power to regulate by law all matters relating to elections to Municipalities.

Bar to interference by courts in electoral matters.

The courts shall have no jurisdiction to examine the validity of a law, relating to delimitation of constituencies or the allotment of seats made under Art. 243ZA. An election to a Municipality can be called in question only by an election petition which should be presented to such authority and in such manner as may be prescribed by or under any law made by the State Legislature.

Committees for (a) District Planning and (b) Metropolitan Planning.

Apart from giving constitutional recognition to Municipalities the 74th Amendment[1] lays down that in every State two committees shall be constituted.

(1) At the district level a District Planning Committee [*Art.* 243ZD].

(2) In every metropolitan area a Metropolitan Planning Committee [*Art.* 243ZE].

The composition of the committees and the manner in which the seats are to be filled are to be provided by a law to be made by the State legislature. But it has been laid down that,—

(a) in case of the District Planning Committee at least 4/5th of the members shall be elected by the elected members of the district level Panchayat and of the Municipalities in the district from amongst themselves. Their proportion would be in accordance with the ratio of urban and rural population of the district.

(b) in case of Metropolitan Planning Committee at least 2/3rd of the members of the committee shall be elected by the Members of the Municipalities and Chairpersons of the Panchayats in the Metropolitan area from amongst themselves. The proportion of seats to be shared by them would be based on the ratio of the population of the Municipalities and of the Panchayats in the area.

The State legislature would by law make provision with respect to (i) the functions relating to district planning that may be assigned to the district committees, and (ii) the manner in which the Chairperson of a district committee may be chosen.

The Committee shall prepare and forward the development plan to the State Government. In regard to the Metropolitan Planning Committee which is to prepare a development plan for the whole Metropolitan area the State Legislature may by law make provision for

(1) the representation of the Central and State Governments and of such organisations and institutions as may be deemed necessary,

(2) the functions relating to planning and co-ordination for the Metropolitan area,

(3) the manner in which the Chairpersons of such committees shall be chosen.

The development plan shall be forwarded to the State Government.

Addition to the duties of the Finance Commission under Art. 280.

This part adds one more function to the duties cast on the Finance Commission appointed by the President under Art. 280. The Commission will make recommendations in regard to the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Municipalities in the State on the basis of the recommendations made by the State Finance Commission.

REFERENCES

1. For the text of the 74th Amendment Act relating to Municipalities [Arts. 243P-243ZG], see Author's *Constitution Amendment Acts*, 7th Ed., pp. 177-84; *Shorter Constitution of India*, 14th Ed., 2008.

PART VI

Administration of Special Areas

CHAPTER 20

ADMINISTRATION OF SCHEDULED AND TRIBAL AREAS

THE Constitution makes special provisions for the Administration of certain areas called 'Scheduled Areas' in States other than Assam, Meghalaya, Tripura and Mizoram even though such areas are situated within a State or Union Territory [*Art.* 244(1)], presumably because of the backwardness of the people of these Areas. Subject to legislation by Parliament, the power to declare any area as a 'Scheduled Area' is given to the President [5th *Schedule*, *paras* 6-7] and the President has made the Scheduled Areas Order, 1950, in pursuance of this power. These are Areas inhabited by Tribes specified as 'Scheduled Tribes', in States *other than* Assam, Meghalaya Tripura and Mizoram.[1] Special provisions for the administration of such Areas are given in the 5th Schedule.

Scheduled Areas.

The Tribal Areas in the States of Assam, Meghalaya, Tripura[2] and Mizoram are separately dealt with [*Art.* 244(2)], and provisions for their administration are to be found in the Sixth Schedule to the Constitution.

Tribal Areas.

The systems of administration under the Fifth and Sixth Schedules may be summarised as follows:

I. The 5th Schedule of the Constitution deals with the administration and control of Scheduled Areas as well as of Scheduled Tribes *in States other than Assam, Meghalaya, Tripura and Mizoram.* The main features of the administration provided in this Schedule are as follows:

Administration of Scheduled Areas in States ***other than Assam, Meghalaya, Tripura and Mizoram.***

The executive power of the Union shall extend to giving directions to the respective States regarding the administration of the Scheduled Areas [*Sch.* V, *para* 3]. The Governors of the States in which there are 'Scheduled Areas'[1] have to submit reports to the President regarding the administration of such Areas, annually or whenever so required by the President [*Sch.* V, *para* 3]. Tribes Advisory Councils are to be constituted to give advice on such matters as welfare and advancement of the Scheduled Tribes in the States as may be referred to them by the Governor [*Sch.* V, *para* 4].

The Governor is authorised to direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or shall apply, only subject to exceptions or modifications. The Governor is also authorised to make regulations to prohibit or restrict the transfer of land by, or among members of, the Scheduled Tribes, regulate the allotment of land,

and regulate the business of money-lending. All such regulations made by the Governor must have the assent of the President [*Sch.* V, *para* 5].

The foregoing provisions of the Constitution relating to the administration of the Scheduled Areas and Tribes may be altered by Parliament by ordinary legislation, without being required to go through the formalities relating to the amendment of the Constitution [*Sch.* V, *para* 7(2)].

The Constitution provides for the appointment of a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States. The President may appoint such Commission at any time, but the appointment of such Commission at the end of ten years from the commencement of the Constitution is obligatory [*Art.* 339(1)]. A Commission was accordingly appointed (with Sri U.N. Dhebar as Chairman) in 1960 and it submitted its report to the President towards the end of 1961.

Tribal Areas in Assam, Meghalaya, Tripura and Mizoram.

II. The Tribal Areas in Assam, Meghalaya, Tripura and Mizoram are specified in the Table appended to the 6th Schedule (para 20) in the Constitution, which has undergone several amendments. Originally, it consisted of two Parts, A and B. But since the creation of the States of Nagaland, the Table (as amended in 1972, 1984 and 1988) includes 9 areas, in four Parts:

Part I—1. The North Kachar Hills District; 2. The Karbi Anglong District.; 3. The Bodoland Territorial Areas District.

Part II—1. The Khasi Hills District; 2. The Jaintia Hills District; 3. The Garo Hills District (in Meghalaya).

Part IIA—Tripura Tribal Areas District.

Part III—1. The Chakma District; 2. The Mara District; 3. The Lai District.

While the administration of Scheduled Areas in States *other than* Assam, Meghalaya, Tripura and Mizoram[2] is dealt with in Sch. V, the 6th Schedule deals with the tribal areas in Assam, Meghalaya, Tripura and Mizoram.[2]

These Tribal Areas are to be administered as autonomous districts. These autonomous districts are not outside the executive authority of the State concerned but provision is made for the creation of District Councils and Regional Councils for the exercise of certain legislative and judicial functions. These Councils are primarily representative bodies and they have got the power of law-making[3] in certain specified fields such as management of a forest other than a reserved forest, inheritance of property, marriage and social customs, and the Governor may also confer upon these Councils the power to try certain suits or offences.[4] These Councils have also the power to assess and collect land revenue and to impose certain specified taxes. The laws made by the Councils shall have, however, no effect unless assented to by the Governor.

With respect to the matters over which the District and Regional Councils are thus empowered to make laws, Acts of the State Legislature shall not extend to such Areas unless the relevant District Council so direct by public notification.[5] As regards other matters, the President with respect to a

Central Act and the Governor with respect to a State Act, may direct that an Act of Parliament or of the State Legislature shall *not* apply to an autonomous district or shall apply only subject to exceptions or modifications as he may specify in his notification.

These Councils shall also possess judicial power, civil and criminal, subject to the jurisdiction of the High Court as the Governor may from time to time specify.

REFERENCES

1. These States, in 1984, are—Andhra Pradesh, Bihar, Gujarat, Himachal Pradesh, Madhya Pradesh, Maharashtra, Orissa and Rajasthan (*India 1984,* p. 152).
2. Meghalaya was added by the North-Eastern Areas (Reorganisation) Act, 1971. Tripura by the Constitution (49th Amendment) Act, 1984 and Mizoram by State of Mizoram Act, 1986.
3. Para 3, Sixth Schedule.
4. Para 4, Sixth Schedule.
5. Paras 12, 12A, 12AA and 12B, Sixth Schedule.

PART VII

The Judicature

CHAPTER 21

ORGANISATION OF THE JUDICIARY IN GENERAL

No Federal Distribution of Judicial Powers.

IT has already been pointed out, that notwithstanding the adoption of a federal system, the Constitution of India has not provided for a double system of Courts as in the *United States.* Under *our* Constitution there is a single integrated system of Courts for the Union as well as the States which administer both Union and State laws, and at the head of the entire system stands the Supreme Court of India. Below the Supreme Court stand the High Courts of the different States[1] and under each High Court there is a hierarchy of other Courts which are referred to in the Constitution as 'subordinate courts' *i.e.*, courts subordinate to and under the control of the High Court [*Arts.* 233-237].

The organisation of the subordinate judiciary varies slightly from State to State, but the essential features may be explained with reference to Table XVI, *post,* which has been drawn with reference to the system obtaining in the majority of the States.

The Supreme Court has issued a direction[2] to the Union and the States to constitute an All India Judicial Service and to bring about uniformity in designation of officers both in criminal and civil side. Concrete steps in this directions are yet to be taken by the Government.

The hierarchy of Courts.

At the lowest stage, the two branches of justice,—civil and criminal,—are bifurcated. The Union Courts and the Bench Courts, constituted under the Village Self-Government Acts, which constituted the lowest civil and criminal Courts respectively, have been substituted by Panchayat Courts set up under post-Constitution State legislation. The Panchayat Courts also function on two sides, civil and criminal, under various regional names, such as the *Nyaya Panchayat, Panchayat Adalat, Gram Kutchery* , and the like. In some States, the Panchayat Courts, are the Criminal Courts of the lowest jurisdiction,[3] in respect of petty cases.

The Munsiff's Courts are the next higher Civil Courts, having jurisdiction as determined by High Courts. Above the Munsiffs are Subordinate Judges who have got unlimited pecuniary jurisdiction over civil suits and hear first appeals from the judgments of Munsiffs. The District Judge hears first appeals from the decisions of Subordinate Judges and also from the Munsiffs (unless they are transferred to a Subordinate Judge) and himself possesses unlimited original jurisdiction, both civil and criminal. Suits of a small value are tried by the Provincial Small Causes Courts.

The District Judge is the highest judicial authority (civil and criminal) in the district. He hears appeals from the decisions of the superior Magistrates and also tries the more serious criminal cases, known as the Sessions cases. A Subordinate Judge is sometimes vested also with the powers of an Assistant Sessions Judge, in which case he combines in his hands both civil and criminal powers like a District Judge.[3]

Since the enactment of the Criminal Procedure Code, 1973, the trial of criminal cases is done exclusively by 'Judicial Magistrates', except in Jammu & Kashmir and Nagaland, to which that Code does not apply. The Chief Judicial Magistrate is the head of the Criminal Courts within the district. In Calcutta and other 'metropolitan areas', there are Metropolitan Magistrates.[3] The Judicial and Metropolitan Magistrates, discharging judicial functions, under the administrative control of the State High Court, are to be distinguished from Executive Magistrates who discharge the executive function of maintaining law and order, under the control of the State Government.

There are special arrangements for civil judicial administration in the 'Presidency towns', which are now called 'metropolitan areas'. The Original Side of the High Court at Calcutta tries the bigger *civil* suits arising within the area of the Presidency town. Suits of lower value within the City are tried by the City Civil Court and the Presidency Small Causes Court. But the Original *Criminal* jurisdiction of all High Courts, including Calcutta, has been taken away by the Criminal Procedure Code, 1973. [3]

The High Court is the supreme judicial tribunal of the State,—having both Original and Appellate jurisdiction. It exercises appellate jurisdiction over the District and Sessions Judge, the Presidency Magistrates and the Original Side of the High Court itself (where the Original Side still continues). There is a High Court for each of the States, except Manipur, Meghalaya, Tripura and Nagaland which have the High Court of Assam (at Gauhati) as their common High Court; and Haryana, which has a common High Court (at Chandigarh) with Punjab. The Bombay High Court is common to Maharashtra and Goa.

As regards the Judiciary in Union Territories, see under 'Union Territories'.

The Supreme Court has appellate jurisdiction over the High Courts and is the highest tribunal of the land. The Supreme Court also possesses original and advisory jurisdictions which will be fully explained hereafter (in Chap. 22).

REFERENCES

1. For a list of High Courts, their seat and territorial jurisdiction, see Table XVII.
2. *All India Judges Asson.* v. *Union of India*, AIR 1992 S.C. 165.
3. See Author's *Criminal Procedure Code, 1973* (Prentice-Hall of India, 2nd Ed., 1992), pp. 33 *et seq.*

CHAPTER 22

THE SUPREME COURT

Constitution of the Supreme Court.

PARLIAMENT has the power to make laws regulating the constitution, organisation, jurisdiction and powers of the Supreme Court. Subject to such legislation, the Supreme Court consists of the Chief Justice of India and not more than *twenty-five*[1] other Judges [*Art.* 124].

Besides, the Chief Justice of India has the power, with the previous consent of the President, to request a retired Supreme Court Judge to act as a Judge of the Supreme Court for a temporary period. Similarly, a High Court Judge may be appointed *ad hoc* Judge of the Supreme Court for a temporary period if there is a lack of quorum of the permanent Judges [*Arts.* 127-128].

Appointment of Judges.

Every Judge of the Supreme Court shall be appointed by the President of India. The President shall, in this matter, consult other persons besides taking the advice of his Ministers. In the matter of appointment of the Chief Justice of India, he shall consult such Judges of the Supreme Court and of the High Courts as he may deem necessary. A nine-Judge Bench of the Supreme Court has laid down that the seniormost Judge of the Supreme Court considered fit to hold the office should be appointed to the office of Chief Justice of India.[2] And in the case of appointment of other Judges of the Supreme Court, consultation with the Chief Justice of India, in addition to the above, is obligatory [*Art.* 124(1)]. Consultation would generally mean concurrence.[2] The above provision, thus, modifies the mode of appointment of Judges by the Executive—by providing that the Executive should consult members of the Judiciary itself, who are well-qualified to give their opinion in this matter.[3]

In a reference[4] (not as a review or reconsideration of the *Second Judges case*) made by the President under Art. 143 relating to the consultation between the Chief Justice of India and his brother Judges in matters of appointment of the Supreme Court Judges and the relevance of seniority in making such appointments, the nine-Judge Bench opined:

1. The opinion of the CJI, having primacy in the consultative process and reflecting the opinion of the judiciary, has to be formed on the basis of consultation with the *collegium,* comprising of the CJI and the four senior most Judges of the Supreme Court. The Judge, who is to succeed the CJI should also be included, if he is not one of the four senior most Judges. Their views should be obtained in writing.

2. Views of the senior most Judges of the Supreme Court, who hail from the High Courts where the persons to be recommended are functioning as Judges, if not the part of the *collegium*, must be obtained in writing.

3. The recommendation of the *collegium* alongwith the views of its members and that of the senior most Judges of the Supreme Court who hail from the High Courts where the persons to be recommended are functioning as Judges should be conveyed by the Chief Justice of India to the Govt. of India.

4. The substance of the views of the others consulted by the Chief Justice of India or on his behalf, particularly those of non-Judges (Members of the Bar) should be stated in the memorandum and be conveyed to the Govt. of India.

5. Normally, the *collegium* should make its recommendation on the basis of consensus but in case of difference of opinion no one would be appointed, if the CJI dissents.

6. If two or more members of the *collegium* dissent, CJI should not persist with the recommendation.

7. In case of non-appointment of the person recommended, the materials and information conveyed by the Govt. of India, must be placed before the original *collegium* or the reconstituted one, if so, to consider whether the recommendation should be withdrawn or reiterated. It is only if it unanimously reiterated that the appointment must be made.

8. The CJI may, in his discretion, bring to the knowledge of the person recommended the reasons disclosed by the Govt. of India for his non-appointment and ask for his response thereto, which, if made, be considered by the *collegium* before withdrawing or reitirating the recommendation.

9. Merit should be predominant consideration though inter-seniority among the Judges in their High Courts and their combined seniority on all India basis should be given weight.

10. Cogent and good reasons should be recorded for recommending a person of outstanding merit regardless of his lower seniority.

11. For recommending one of several persons of more or less equal degree of merit, the factor of the High Courts not represented on the Supreme Court, may be considered.

12. The Judge passed over can be reconsidered unless for strong reasons, it is recorded that he be never appointed.

13. The recommendations made by the CJI without complying with the norms and requirements, are not binding on the Govt. of India.

Qualifications for appointment as Judge.

A person shall not be qualified for appointment as a Judge of the Supreme Court unless he is (a) a citizen of India; and (b) either,—(i) a distinguished jurist; or (ii) has been a High Court Judge for at least 5 years; or (iii) has been an Advocate of a High Court (or two or more such

Courts in succession) for at least 10 years [*Art.* 124(3)].

Tenure of Judges.

No minimum age is prescribed for appointment as a Judge of the Supreme Court, nor any fixed period of office. Once appointed, a Judge of the Supreme Court may cease to be so, on the happening of any one of the following contingencies (other than death):

(a) On attaining the age of 65 years; (b) On resigning his office by writing addressed to the President; (c) On being removed by the President upon an address to that effect being passed by a special majority of each House of Parliament (*viz.*, a majority of the total membership of that House and by majority of not less than two-thirds of the members of that House present and voting).

The only grounds upon which such removal may take place are (1) 'proved misbehaviour' and (2) 'incapacity' [*Art.* 124(4)].

Impeachment of a Judge.

The combined effect of Art. 124(4) and the Judges (Inquiry) Act, 1968 is that the following procedure is to be observed for removal of a Judge. This is commonly known as impeachment—

(1) A motion addressed to the President signed by at least 100 members of the Lok Sabha or 50 members of the Rajya Sabha is delivered to the Speaker or the Chairman.

(2) The motion is to be investigated by a Committee of three (2 Judges of the Supreme Court and a distinguished jurist).

(3) If the Committee finds the Judge guilty of misbehaviour or that he suffers from incapacity the motion (para 1, *above)* together with the report of the Committee is taken up for consideration in the House where the motion is pending.

(4) If the motion is passed in each House by majority of the total membership of that House and by a majority of not less than two-thirds of that House present and voting the address is presented to the President.

(5) The Judge will be removed after the President gives his order for removal on the said address.

The procedure for impeachment is the same for Judges of the Supreme Court and the High Courts. After the Constitution this procedure was started against SHRI R. RAMASWAMY in 1991-93. The Committee found the Judge guilty. In the Lok Sabha the Congress Party abstained from voting and so the motion could not be passed with requisite majority.

Salaries, etc.

A Judge of the Supreme Court gets a salary of Rs. 30,000 *per mensem*[5] and the use of an official residence free of rent. The salary of the Chief Justice is Rs. 33,000.[5]

Independence of Supreme Court Judges, how secured.

The independence of the Judges of the Supreme Court is sought to be secured by the Constitution in a number of ways:

(a) Though the appointing authority is the President, acting with the advice of his Council of Ministers, the appointment of Supreme Court Judge has been lifted from the realm of pure politics by requiring the President to consult the Chief Justice of India in the matter.[3]

(b) By laying down that a Judge of the Supreme Court shall not be removed by the President, except on a joint address by both Houses of Parliament (supported by a majority of the total membership and a majority of not less than two-thirds of the members present and voting, in each House), on ground of proved misbehaviour or incapacity of the Judge in question [*Art.* 124(4)].

This provision is similar to the rule prevailing in England since the Act of Settlement, 1701, to the effect that though Judges of the Superior Courts are appointed by the Crown, they do not hold office during his pleasure, but hold their office 'on good behaviour' and the Crown may remove them only upon a joint address from both Houses of Parliament.

(c) By fixing the salaries of the Judges by the Constitution and providing that though the allowances, leave and pension may be determined by law made by Parliament, these shall not be varied to the disadvantage of a Judge during his term of office. In other words, he will not be affected adversely by any changes made by law since his appointment [*Art.* 125(2)].

But it will be competent for the President to override this guarantee, under a Proclamation of 'Financial Emergency' [*Art.* 360(4)(b)].

(d) By providing that the administrative expenses of the Supreme Court, the salaries and allowances, etc., of the Judges as well as of the staff of the Supreme Court shall be 'charged upon the Consolidated Fund of India'; *i.e.*, shall not be subject to vote in Parliament [*Art.* 146(3)].

(e) By forbidding the discussion of the conduct of a Judge of the Supreme Court (or of a High Court) in Parliament, except upon a motion for an address to the President for the removal of the Judge [*Art.* 121].

(f) By laying down that after retirement, a Judge of the Supreme Court shall not plead or act in any Court or before any authority within the territory of India[6] [*Art.* 124(7)].

[It is to be noted that there are analogous provisions in the case of High Court Judges; see Chap. 23, *post*.]

Position of the Supreme Court under the Constitution.

It has been rightly said that the jurisdiction and powers of our Supreme Court are in their nature and extent wider than those exercised by the highest Court of any other country.[7] It is at once a federal Court, a Court of appeal and a guardian of the Constitution, and the law declared by it, in the exercise of any its jurisdictions under the Constitution, is binding on all other Courts within the territory of India [*Art.* 141].

Compared with the American Supreme Court.

Our Supreme Court possesses larger powers[8] than the American Supreme Court in several respects—

Firstly, the American Supreme Court's appellate jurisdiction is confined to cases arising out of the federal relationship or those relating to the constitutional validity of laws and treaties. But *our* Supreme Court is not only a federal court and a guardian of the Constitution, but also the highest court of appeal in the land, relating to civil and criminal cases [*Arts.* 133-134], apart from cases relating to the interpretation of the Constitution.

Secondly, our Supreme Court has an extraordinary power to entertain appeal, without any limitation upon its discretion, from the decision not only of any court but also of any tribunal within the territory of India [*Art.* 136]. No such power belongs to the American Supreme Court.

Thirdly, while the American Supreme Court has denied to itself any power to advise the Government and confined itself only to the determination of actual controversies between parties to a litigation, *our* Supreme Court is vested by the Constitution itself with the power to deliver advisory opinion on any question of fact or law that may be referred to it by the President [*Art.* 143].

(i) As a Federal Court.

Every federal Constitution, whatever the degree of cohesion it aims at, involves a distribution of powers between the Union and the units composing the Union, and both Union and State Governments derive their authority from, and are limited by the same Constitution. In a unitary Constitution, like that of England, the local administrative or legislative bodies are mere subordinate bodies under the central authority. Hence, there is no need of judicially determining disputes between the central and local authorities. But in a federal Constitution, the powers are divided between the national and State Governments, and there must be some authority to determine disputes between the Union and the States or the States *inter se* and to maintain the distribution of powers as made by the Constitution.

Though *our* federation is not in the nature of a treaty or compact between the component units, there is, nevertheless, a division of legislative as well as administrative powers between the Union and the States. Article 131 of *our* Constitution, therefore, vests the Supreme Court with original and exclusive jurisdiction to determine justiciable disputes between the Union and the States or between the States *inter se.*[8]

(ii) As a Court of Appeal.

Like the House of Lords in England, the Supreme Court of India is the final appellate tribunal of the land, and in some respects, the jurisdiction of the Supreme Court is even wider than that of the House of Lords. As regards *criminal* appeals, an appeal lies to the House of Lords only if the Attorney-General certifies that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance and that it is desirable in the public interest that a further appeal should be brought. But in cases specified in Cls. (*a*) and (*b*) of Art. 134(1) of *our* Constitution (death sentences), an appeal will lie to the Supreme Court as of right.

As to appeals from High Courts in *civil* cases, however, the position has been altered by an amendment of Art. 133(1) by the Constitution (30th

Amendment) Act, 1972, which has likened the law to that in England. Civil appeals from the decisions of the Court of Appeal lie to the House of Lords only if the Court of Appeal or the House of Lords grants leave to appeal. Under Art. 133(1) of *our* Constitution as it originally stood, an appeal to the Supreme Court lay as of right in cases of higher value (as certified by the High Court). But this value test and the category of appeal as of right has been abolished by the amendment of 1972, under which appeal from the decision of a High Court in a civil matter will lie to the Supreme Court only if the High Court certifies that the case involves 'a substantial question of law of general importance' and that 'the said question needs to be decided by the Supreme Court'.[8]

But the right of the Supreme Court to entertain appeal, *by special leave,* in any cause or matter determined by any Court or tribunal in India, save military tribunals, is unlimited [*Art.* 136].

As against unconstitutional acts of the Executive the jurisdiction of the Courts is nearly the same under all constitutional systems. But not so is the control of the Judiciary over the Legislature.

(iii) As a Guardian of the Constitution.

It is ture that there is no express provision in *our* Constitution empowering the *Courts* to invalidate laws; but the Constitution has imposed definite limitations upon each of the organs of the state, and any transgression of those limitations would make the law *void*. It is for the Courts to decide whether any of the constitutional limitations has been transgressed or not,[9] because the Constitution is the organic law subject to which ordinary laws are made by the Legislature which itself is set up by the Constitution.

Thus, Art. 13 declares that any law which contravenes any of the provisions of the Part on Fundamental Rights, shall be *void*. But, as *our* Supreme Court has observed,[9] even without the specific provision in Art. 13 (which has been inserted only by way of abundant caution), the Court would have the powers to declare any enactment which transgresses a fundamental right as invalid.

Similarly, Art. 254 says that in case of inconsistency between Union and state laws in certain cases, the State law shall be *void*.

The limitations imposed by *our* Constitution upon the powers of Legislatures are—(a) Fundamental rights conferred by Part III. (b) Legislative competence. (c) Specific provisions of the Constitution imposing limitations relating to particular matters.[10]

It is clear from the above that (apart from the jurisdiction to issue the writs to enforce the fundamental rights, which has been explained earlier) the jurisdiction of the Supreme Court is three-fold: (a) Original; (b) Appellate; and (c) Advisory.

A. Original Jurisdiction of Supreme Court.

The Original jurisdiction of the Supreme Court is dealt with in Art. 131 of the Constitution. The functions of the Supreme Court under Art. 131 are purely of a federal character and are confined to disputes between the Government of India and any of the States of the Union, the

Government of India and any State or States on one side and any other State or States on the other side, or between two or more States *inter se*. In short, these are disputes between different units of the federation which will be within the exclusive original jurisdiction of the Supreme Court. The Original jurisdiction of the Supreme Court will be *exclusive*, which means that no other court in India shall have the power to entertain any such suit. On the other hand, the Supreme Court in its original jurisdiction will not be entitled to entertain any suit where *both* the parties are not units of the federation. If any suit is brought either against the State or the Government of India by a private citizen, that will *not lie* within the original jurisdiction of the Supreme Court but will be brought in the ordinary courts under the ordinary law.

Again, one class of disputes, though a federal nature, is excluded from this original jurisdiction of the Supreme Court, namely, a dispute arising out of any treaty, agreement, covenant, engagement; 'sanad' or other similar instrument which, having been entered into or executed before the commencement of this Constitution continues in operation after such commencement or which provides that the said jurisdiction shall not extend to such a dispute.[11] But these disputes may be referred by the President to the Supreme Court for its *advisory* opinion.

It may be noted that until 1962, no suit in the original jurisdiction had been decided by the Supreme Court. It seems that the disputes, if any, between the Union and the units or between the units *inter se* had so far been settled by negotiation or agreement rather than by adjudication. The first suit, brought by the State of West Bengal against the Union of India in 1961, to declare the unconstitutionality of the Coal Bearing Areas (Acquisition and Development) Act, 1957, was dismissed by the Supreme Court.[12]

In this context, it should be further noted that there are certain provisions in the Constitution which exclude from the original jurisdiction of the Supreme Court certain disputes, the determination of which is vested in other tribunals:

(i) Disputes specified in the Proviso to Arts. 131 and 363(1).

(ii) Complaints as to interference with inter-State water supplies, referred to the statutory tribunal mentioned in Art. 262, if Parliament so legislates.

Since Parliament has enacted the Inter-State Water Disputes Act (33 of 1956), Art. 262 has now to be read with s. 11 of that Act.

(iii) Matters referred to the Finance Commission [*Art.* 280].

(iv) Adjustment of certain expenses as between the Union and the States under Arts. 257(4), 258(3).

(v) Adjustment of certain expenses as between the Union and the States [*Art.* 290].

B. Writ Jurisdiction.

The jurisdiction of the Supreme Court to entertain an application under Art. 32 for the issue of a constitutional writ for the enforcement of Fundamental Rights, is sometimes treated as an 'original' jurisdiction of the Supreme

Court. It is no doubt original in the sense that the party aggrieved has the right to directly move the Supreme Court by presenting a petition, instead of coming through a High Court by way of appeal. Nevertheless, it should be treated as a separate jurisdiction since the dispute in such cases is not between the units of the Union but an aggrieved individual and the Government or any of its agencies. Hence, the jurisdiction under Art. 32 has no analogy to the jurisdiction under Art. 131.

C. Appellate Jurisdiction of Supreme Court.

The Supreme Court is the highest court of appeal from all courts in the territory of India, the jurisdiction of the Judicial Committee of the Privy Council to hear appeals from India having been abolished on the eve of the Constitution. The *Appellate* jurisdiction of the Supreme Court may be divided under three heads:

(i) Cases involving interpretation of the Constitution,—civil, criminal or otherwise.

(ii) Civil cases, irrespective of any constitutional question.

(iii) Criminal cases, irrespective of any constitutional question.

Apart from appeals to the Supreme Court by special leave of that Court under Art. 136, an appeal lies to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in two classes of cases—

(A) Where the case involves a substantial question of law as to the *interpretation of the Constitution,* an appeal shall lie to the Supreme Court on the certificate of the High Court that such a question is involved or on the leave of the Supreme Court where the High Court has refused to grant such a certificate but the Supreme Court is satisfied that a substantial question of law as to the interpretation of the Constitution is involved in the case [*Art.* 132].

(B) In cases where no *constitutional* question is involved, appeal shall lie to the Supreme Court if the High Court certifies that the following conditions are satisfied [*Art.* 133(1)]—

(i) that the case involves a substantial question of law;

(ii) that in the opinion of the High Court the said question should be decided by the Supreme Court.

(i) Criminal.

Prior to the Constitution, there was no court of criminal appeal over the High Courts. It was only in a limited sphere that the Privy Council entertained appeals in criminal cases from the High Courts by *special leave* but there was no appeal *as of right*. Article 134 of the Constitution for the first time provides for an appeal to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court, as of right, in two specified classes of cases—

(a) where the High Court has on an appeal reversed an order of acquittal of an accused person and sentenced him to death;

(b) where the High Court has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused and sentenced him to death.

In these two classes of cases relating to a sentence of death by the High Court, appeal lies to the Supreme Court as of right.

Besides the above two classes of cases, an appeal may lie to the Supreme Court in any criminal case if the High Court certifies that the case is a fit one for appeal to the Supreme Court. The certificate of the High Court would, of course, be granted only where some substantial question of law or some matter of great public importance or the infringement of some essential principles of justice are involved. Appeal may also lie to the Supreme Court (under *Art.* 132) from a criminal proceeding if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.

Except in the above cases, no appeal lies from a criminal proceeding of the High Court to the Supreme Court under the Constitution but Parliament has been empowered to make any law conferring on the Supreme Court further powers to hear appeals from criminal matters.

(ii) Appeal by Special Leave.

While the Constitution provides for regular appeals to the Supreme Court from decisions of the High Courts in Arts. 132 to 134, there may still remain some cases where justice might require the interference of the Supreme Court with decisions not only of the High Courts outside the purview of Arts. 132-134 but also of any other court or tribunal within the territory of India. Such residuary power outside the ordinary law relating to appeal is conferred upon the Supreme Court by Art. 136. This Article is worded in the widest terms possible—

> "136. (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.
>
> (2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting special leave, against any kind of judgment or order made by any court or tribunal (except a military tribunal) in any proceeding and the exercise of the power is left entirely to the *discretion* of the Supreme Court unfettered by any restrictions and this power cannot be curtailed by any legislation short of amending the Article itself. This wide power is not, however, to be exercised by the Supreme Court so as to entertain an appeal in *any* case where no appeal is otherwise provided by the law or the Constitution. It is a special power which is to be exercised only under *exceptional circumstances* and the Supreme Court has already laid down the principles according to which this extraordinary power shall be used, *e.g.*, where there has been a violation of the principles of natural justice. In *civil cases* the special leave to appeal under this Article would not be granted unless there is some substantial question of law or general public interest involved in the case. Similarly, in *criminal* cases the

Supreme Court will not interfere under Art. 136 unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against.[13] Similarly, it will not substitute its own decision for the determination of a *tribunal* but it would interfere to quash the decision of a quasi-judicial tribunal under its extraordinary powers conferred by Art. 136 when the tribunal has either exceeded its jurisdiction or has approached the question referred to in a manner which is likely to result in injustice or has adopted a procedure which runs counter to the established rules of natural justice.[14]

D. Advisory jurisdiction.

Besides the above regular jurisdiction of the Supreme Court, it shall have an *advisory* jurisdiction, to give its *opinion*, on any question of law or fact of public importance as may be referred to it for consideration by the President.

Article 143 of the Constitution lays down that the Supreme Court may be required to express its opinion in two classes of matters, in an advisory capacity as distinguished from its judicial capacity :

(a) In the first class, any question of law may be referred to the Supreme Court for its opinion if the President considers that the question is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court. It differs from a regular adjudication before the Supreme Court in this sense that there is no litigation between two parties in such a case and that the opinion given by the Supreme Court on such a reference is not binding upon the Government itself and further that the opinion is not executable as a judgment of the Supreme Court. The opinion is only advisory and the Government may take it into consideration in taking any action in the matter but it is not bound to act in conformity with the opinion so received. The chief utility of such an advisory judicial opinion is to enable the Government to secure an authoritative opinion either as to the validity of a legislative measure before it is enacted or as to some other matter which may not go to the courts in the ordinary course and yet the Government is anxious to have authoritative legal opinion before taking any action.

Up to 2007 there were *fourteen* cases of reference of this class made by the President.[15-28] It may be mentioned that though the opinion of the Supreme Court on such a reference may not be binding on the Government, the propositions of law declared by the Supreme Court even on such a reference are binding on the subordinate courts. In fact, the propositions laid down in the *Delhi Laws* case[15] have been frequently referred to and followed since then by the subordinate courts. The Supreme Court is entitled to decline to answer a question posed to it under Art. 143 if it is superfluous or unnecessary.[22]

(b) The second class of cases belong to the disputes arising out of pre-Constitution treaties and agreements which are excluded by Art. 131, Proviso, from the Original Jurisdiction of the Supreme Court, as we have already seen. In other words, though such disputes cannot come to the Supreme Court as a litigation under its Original jurisdiction, the subject-matter of such disputes may be referred to by the President for the opinion of the Supreme Court in its advisory capacity.

E. Miscellaneous Jurisdiction.

There are provisions for reference to this Court under Art. 317(1) of the Constitution, s. 257 of the Income-tax Act, 1961, s. 7(2) of the Monopolies and Restrictive Trade Practices Act, 1969, s. 130A of the Customs Act, 1962 and s. 35H of the Central Excise and Salt Act, 1944.

Appeals also lie to Supreme Court under the Representation of the People Act, 1951; Monopolies and Restrictive Trade Practices Act, 1969; Advocates Act, 1961; Contempt of Courts Act, 1971; Customs Act, 1962; Central Excise and Salt Act, 1944; Terrorist Affected Areas (Special Courts) Act, 1984; Terrorist and Disruptive Activities (Prevention) Act, 1985; Trial of Offences relating to Transactions in Securities Act, 1992 and Consumer Protection Act, 1986.

Election Petitions under Part III of the Presidential and Vice-Presidential Elections Act, 1952 are also filed directly in the Supreme Court.

The 42nd,43rd and 44th Amendments.

The jurisdiction of the Supreme Court, as outlined in the foregoing pages, was curtailed by the 42nd Amendment of the Constitution (1976), in several ways. But some of these changes have been recoiled by the Janata Government, by repealing them by the 43rd Amendment Act, 1977, so that the reader need not bother about them. The provisions so repealed are Arts. 32A, 144A.

But there are several other provisions which were introduced by the 42nd Amendment Act, 1976, but the Janata Government failed to dislodge them, owing to the opposition of the Congress Party in the *Rajya Sabha*. These are—

(i) *Art. 323A—323B*. The intent of these two new Articles was to take away the jurisdiction of the Supreme Court under Art. 32 over orders and decisions of Administrative Tribunals. These Articles could, however, be implemented only by legislation which Mrs. Gandhi's *first* Government had no time to undertake.

Article 323A has been implemented by the Administrative Tribunals Act, 1985 [see, further, under Chap. 30, *post*].

But subsequently, the position turned out to be otherwise as the Supreme Court declared the Articles 323-A, Cl. 2(d) and 323-B, Cl. 3(d) and also the "exclusion of jurisdiction" clauses in all the legislations enacted in pursuance of these Articles, unconstitutional to the extent they excluded the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32.[29]

(ii) *Art. 368(4)—(5)*. These two clauses were inserted in Art. 368 with a view to preventing the Supreme Court from invalidating any Constitution Amendment Act on the theory of 'basic features of Constitution' or anything of that nature.

Curioulsy, however, these Clauses have been emasculated by the Supreme Court itself, striking them down on the ground that they are violative of two 'basic features' of the Constitution—(a) the limited nature of the amending power under Art. 368, and (b) judicial review,—in the *Minerva Mills* case.[30]

REFERENCES

1. The Constitution provided for seven Judges besides the Chief Justice, subject to legislation by Parliament. Parliament has enacted the Supreme Court (Number of Judges) Acts, 1956 and 1986, raising this number to 25.
2. *Supreme Court Advocates* v. *Union of India*, (1993) 4 S.C.C. 441 (9-Judge Bench).
3. VIII C.A.D. 258. But there is no such safeguard in the case of appointment of a Chief Justice, and when A.N. RAY, J., was appointed Chief Justice, after superseding three senior Judges,- HEGDE, GROVER and SHELAT, there was an uproar in which the Supreme Court Bar Association joined, that the Senior Judges had been superseded solely because their judgment in *Keshavananda's* case (AIR 1973 S.C. 1461) had been unfavourable to the Government.

   Again in January 1977 instead of H.R. KHANNA, J., the seniormost Judge M.U. BEG, J. was made the Chief Justice of India. Justice KHANNA resigned just as the three Judges had done a few years back. It was said the supersession was because of his dissenting judgment in *A.D.M.* v. *Shukla*, AIR 1976 S.C. 1207.

   After the judgment referred to in f.n. 2 above viz. *Supreme Court Advocates* v. *Union of India*, it appears that discretion of the executive has been curtailed.
4. *Special Reference No. 1 of 1998,* Re :, (1998) 7 S.C.C. 739. The Bench expressed its optimistic view that the successive CJIs shall henceforth act in accordance with *the Second Judges case* and the opinion in the instant reference.
5. The salaries of Judges of the Supreme Court and the High Courts has been enhanced *vide* Act 18 of 1998, s. 7 (w.e.f. 1.1.1996).
6. But, curiously, there is no bar against a retired Judge from being appointed to any office under the Government [as there is in the case of the Comptroller and Auditor-General: Art. 148(4)]; and the expectation of such employment after retirement indirectly detracts from the independence of the Judges from executive influence. In fact, retired Judges have been appointed to hold offices such as that of Governor, Ambassador and the like, apart from membership of numerous Commissions or Boards.
7. Attorney-General of India (1956) S.C.R. 8; A.K. AIYAR, *The Constitution and Fundamental Rights,* 1955, p. 15.
8. *Vide* Author's *Constitutional Law of India* (Prentice-Hall of India, 1991), pp. 168 *et. seq.*
9. *A.K. Gopalan* v. *State of Madras*, (1950) S.C.R. 88 (*100*); Ref. Under Art. 143, AIR 1965 S.C. 745 (*762*).
10. *Vide* Author's *Constitutional Law of India, ibid.*, p. 270.
11. Article 131, *Proviso*, as amended by the Constitution (7th Amendment) Act, 1956.
12. *State of West Bengal* v. *Union of India*, AIR 1963 S.C. 1241.
13. *Pritam Singh* v. *State*, AIR 1950 S.C. 169.
14. *D.C. Mills* v. *Commr. of I.T.*, AIR 1955 S.C. 65.
15. In re *Delhi Laws Act, 1912* (1951) S.C.R. 747 [regarding the validity of the Delhi Laws Act, 1912].
16. Re *Kerala Education Bill*, AIR 1958 S.C. 956 [regarding the constitutionality of the Kerala Education Bill].
17. Re *Berubari Union*, (1960) 3 S.C.R. 250 [regarding the procedure for implementation of the Indo-Pakistan Agreement relating to the Berubari Union].
18. In re *Sea Customs*, AIR 1963 S.C. 1760 [regarding the constitutionality of the Sea Customs Amendment Bill, with reference to Art. 289 of the Constitution].
19. Special Reference I of 1964 (re. U.P. Legislature), AIR 1965 S.C. 745.
20. In re *Presidential Election, 1974*, AIR 1974 S.C. 1682.
21. In re *Special Courts Bill, 1978*, AIR 1979 S.C. 478 (dated 1-12-1978).
22. In re *Cauvery Waters Disputes Tribunal*, AIR 1992 S.C. 1183.
23. *Special Reference No. 1 of 1993.* [regarding issue of an ordinance to acquire certain disputed land near Ram Janma Bhumi and whether a temple stood at that place]. *Ismail Faruqui* v. *Union of India*, (1994) 6 S.C.C. 360 (Rama Janma Bhumi case).

24. *Special Reference No. 1 of 1998,* (1998) 7 SCC 739. [Regarding consultation with the Chief Justice of India and method of communicating in regard to appointment of S.C. and H.C. Judges].
25. *Reference No. 1 of 1982.* [Regarding validity of Resettlement Act, passed by the State of J&K, decided or 8.11.2001 but unreported yet].
26. *Special Reference No. 1 of 2002, (In re, Gujarat Assembly Election Matter,* (2002) 8 SCC 237. [Gujarat Assembly was prematuredly dissolved. Reference was regarding whether the new Assembly must meet within six months. It involved interpretation of Arts. 174, 324 and 356].
27. *Special Reference No. 1 of 2001,* (2004) 4 SCC 489. [Regarding whether States have legislative competence to legislate on the subject of natural gas and liquefied natural gas under Entry 25 of List II of Sch. VII or whether the Union has exclusive jurisdiction over natural gas in whatever physical form under Entry 53 List I of Sch. VII]. [Opinion delivered on 25-03-2004].
28. The Punjab Termination of Agreement Act, 2004, passed by Punjab State Legislature referred in July 2004 regarding legislative competence (not yet decided).
29. *L. Chandra Kumar* v. *Union of India,* (1997) 3 S.C.C. 261 : A.I.R. 1997 S.C. 1125.
30. *Minerva Mills* v. *Union of India,* AIR 1980 S.C. 1789 (paras 22-26, 28, 93-94).

CHAPTER 23

THE HIGH COURT

The High Court of a State.

THERE shall be a High Court in each State [*Art.* 214] but Parliament has the power to establish a common High Court for two or more States[1][*Art.* 231]. The High Court stands at the head of the Judiciary in the State [see Table XVII].

Constitution of High Courts.

(a) Every High Court shall consist of a Chief Justice and such other Judges as the President of India may from time to time appoint.

(b) Besides, the President has the power to appoint (i) *additional* Judges for a temporary period not exceeding two years, for the clearance of arrears of work in a High Court; (ii) an acting Judge, when a permanent Judge of a High Court (other than a Chief Justice) is temporarily absent or unable to perform his duties or is appointed to act temporarily as Chief Justice. The acting Judge holds office until the permanent Judge resumes his office. But neither an additional nor an acting Judge can hold office beyond the age of 62 years.[2]

Appointment and Conditions of the Office of a Judge of a High Court.

Every Judge of a High Court shall be appointed by the President. In making the appointment, the President shall consult the Chief Justice of India, the Governor of the State (and also the Chief Justice of that High Court in the matter of appointment of a Judge other than the Chief Justice).

Participatory Consultative Process.—A nine-Judge Bench of the Supreme Court[3] has held that (1) the process of the appointment of the Judges of the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the constitutional functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the constitutional purpose, so that the occasion of primacy does not arise.

(2) Initiation of the proposal for appointment in the case of High Court must invariably be made by the Chief Justice of that High Court.

(3) In the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary 'symbolised by the view of the Chief Justice of India' formed by him in consultation with two senior most Judges of the Supreme Court who come from that State, would have supremacy.

(4) No appointment of any Judge of a High Court can be made unless it is in conformity with the opinion of the Chief Justice of India.

(5) In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that the appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the CJI and the other Judges of the Supreme Court, consulted by him in the matter, on reiteration of the recommendation by the CJI, the appointment should be made as a healthy convention.

Subsequently, the President of India in exercise of his powers under Art. 143 made a Reference[4] to the Supreme Court relating to the consultation between the CJI and his brother Judges in matters of appointments of the High Court Judges, but not as a review or reconsideration of the *Supreme Court Advocates case* (*Second Judges case*) above. The S.C. opined that "consultation with the CJI" implies consultation with a plurality of Judges in the formation of opinion. His sole opinion does not constitute consultation. Only a *collegium* comprising the CJI and two senior most Judges of the S.C., as was in the *Second Judges case* above, should make the recommendation. The *collegium* in making its decision should take into account the opinion of the CJI of the High Court concerned which "would be entitled to the greatest weight," the views of the other Judges of the High Court who may be consulted and the views of the other Judges of the S.C. "who are conversant with the affairs of the High Court concerned." The views of the Judges of the S.C. who were puisne Judges of the High Court or C.J., thereof, will also be obtained irrespective of the fact that the H.C. is not their parent H.C. and they were transfered there. All these views should be expressed in writing and be conveyed to the Govt. of India alongwith the recommendation of the *collegium*. The recommendations made by the CJI without complying with the norms and requirements of the consultation process, as aforestated, are not binding upon the Govt. of India.

Judicial review would be available if the aforestated procedure is not followed or the appointee is found to lack eligibility.

A Judge of the High Court shall hold office until the age of 62 years.[2]

Every Judge,—permanent, additional or acting,—may vacate his office earlier in any of the following ways—

(i) By resignation in writing addressed to the President.

(ii) By being appointed a Judge of the Supreme Court or being transferred to any other High Court, by the President.

(iii) By removal by the President on an address of both Houses of Parliament (supported by a majority of the total membership of that house and by the vote of not less than 2/3 of the members present), on the ground of proved misbehaviour or incapacity. The mode of removal of a Judge of the High Court shall thus be the same as that of a Judge of the Supreme Court, and both shall hold office during 'good behaviour' [*Art.* 217(1)]. This procedure is known as impeachment and is the same as that for a Judge of the Supreme Court. [For details, see Chap. 22 under, "Impeachment of a Judge".]

Salaries, etc.

A Judge of a High Court gets a salary of Rs. 26,000/- *per mensem* while the Chief Justice gets Rs. 30,000/- *per mensem.*[5] He is also entitled to such allowances and rights in respect of leave and pension as Parliament may from time to time determine, but such allowances and rights cannot be varied by Parliament to the disadvantage of a Judge after his appointment [*Art.* 221].

Qualifications for Appointment as High Court Judge.

The qualifications laid down in the Constitution for being eligible for appointment as a Judge of the High Court are that—

(a) he must be a citizen of India, not being over 62 years; and must have

(b) (i) held for at least 10 years a judicial office in the territory of India; or

(ii) been for at least 10 years an advocate of a High Court or of two or more such Courts in succession [*Art.* 217(2)].

Independence of the Judges.

As in the case of the Judges of the Supreme Court, the Constitution seeks to maintain the independence of the Judges of the High Courts by a number of provisions:

(a) By laying down that a Judge of the High Court shall not be removed, except in the manner provided for the removal of a Judge of the Supreme Court, that is, upon an address of each House of Parliament (passed by a special majority [*Art.* 218];

(b) By providing that the expenditure in respect of the salaries and allowances of the Judges shall be charged on the Consolidated Fund of the State [*Art.* 202(3)(d)];

(c) By specifying in the Constitution the salaries payable to the Judges and providing that the allowances of a Judge or his rights in respect of absence or pension shall not be varied by Parliament to his disadvantage after his appointment [*Art.* 221], except under a Proclamation of Financial Emergency [*Art.* 360(4)(b)];

(d) By laying down that after retirement a permanent Judge of High Court shall not plead or act in a Court or before any authority in India, except the Supreme Court and a High Court other than the High Court in which he had held his office [*Art.* 220].

Control of the Union over High Courts.

As Sir Alladi Krishnaswami explained in the Constituent Assembly,[6] while ensuring the independence of the Judiciary, the Constitution placed the High Courts under the control of the Union in certain important matters, in order to keep them outside the range of 'provincial politics'. Thus, even though the High Court stands at the head of the State Judiciary, it is not so sharply separated from the federal Government as the highest Court of an American State (called the State Supreme Court) is. The control of the Union over a High Court in India is exercised in the following matters:

(a) Appointment [*Art.* 217], transfer[7] from one High Court to another [*Art.* 222] and removal [*Art.* 217(1), *Prov.* (b)], and determination of dispute as to age [*Art.* 217(3)], of Judges of High Courts.

Transfer.—Now the power to transfer of the High Court Judges remains no more a method of control over the High Court by the Union Government as the Supreme Court has prescribed a procedure for the purpose in a Reference[8] made by the President of India in exercise of his powers under Art. 143. The Supreme Court opined that the Chief Justice of India should obtain the views of the Chief Justice of the High Court from which the proposed transfer is to be effected as also that of the Chief Justice of the High Court to which the transfer is to be effected (as was stated in the *Second Judges case* in 1993). The Chief Justice of India should also take into account the views of one or more Supreme Court Judges who are in position to provide material which would assist in the process of deciding whether or not a proposed transfer should take place. These views should be expressed in writing and should be considered by CJI and the four senior most puisne Judges of the Supreme Court. These views and those of each of the four senior most Judges should be conveyed to the Govt. of India with the proposal of transfer.

What applies to the transfer of puisne Judges of a H.C. applies as well to the transfer of the Chief Justice of a High as a C.J. of another H.C. except that in this case, only the views of one or more knowledgeable Judges need be taken into account.

These factors, including the response of the High Court Chief Justice or the puisne Judge proposed to be transferred, to the proposal to transfer him, should be placed before the *collegium*—the CJI and his first four puisne Judges—to be taken into account by it before reaching a final conclusion on the proposal.

Unless the decision to transfer has been taken in the manner aforestated, it is not decisive and does not bind the Govt. of India and shall be subject to judicial review.

(b) The constitution and organisation of High Courts and the power to establish a common High Court for two or more States and to extend the jurisdiction of a High Court to, or to exclude its jurisdiction from, a Union Territory, are all exclusive powers of the Union Parliament.

It should be pointed out in the present context that there are some provisions introduced into the original Constitution by subsequent amendments, which affect the independence of High Court Judges, as compared with Supreme Court Judges :

(a) Art. 224 was introduced by substitution, in 1956, to provide for the appointment of additional Judges to meet 'any temporary increase in the business of a High Court'. An additional Judge, so appointed, holds office for two years, but he may be made permanent at the end of that term. There is no such corresponding provision for the Supreme Court. It was introduced in the case of the High Courts because of the problem of arrears of work, which was expected to disappear in the near future. Now that the problem of arrears has become a standing problem which is being met by the addition of more Judges, there is no particular reason why the make-shift device of additional appointment should continue. The inherent vice of this latter device is that it keeps an additional Judge on probation and under the tutelage of the Chief Justice as well as the Government[7] as to whether he would get a permanent appointment at the end of two years. So far as the judicial power of a High Court Judge is concerned, he ranks as an equal to every other member of a Bench and is not expected, according to any principle relating to the administration of justice, to 'agree' with the Chief Justice or any other senior member of a Bench where his learning, conscience or wisdom dictates otherwise, or to stay his hands where the merits of a case require a judgment against the Government. The fear of losing his job on the expiry of two years obviously acts as an inarticulate obsession upon an additional Judge.

(b) Similarly, Cl.(3) was inserted in Art. 217 in 1963, giving the President, in consultation with the Chief Justice of India, the final power to determine the age of High Court Judge, if any question is raised by anybody in that behalf. By the same amendment of 1963 (15th Amendment), Cl.(2A) was inserted in Art.124, laying down that a similar question as to the age of a Supreme Court Judge shall be determined in such manner as Parliament may by law provide. A High Court Judge's position has thus become not only unnecessarily inferior to that of a Supreme Court Judge but even to that of a subordinate Judicial Officer, because any administrative determination of the latter's age is open to challenge in a Court of law, but in the case of a High Court Judge, it is made 'final' by the Constitution itself.[9] There is, apparently, no impelling reason why a provision similar to Cl. (2A) to Art. 124 shall not be introduced in Art. 217, in place of Cl. (3), in question.

(c) Another agency of control over High Court Judges is the provision in Art. 221(1) for their transfer from one High Court to another, which has been given a momentum in 1994 by transferring as many as 50 Judges at a time.[10] In order that the power of the President to order such transfer is not used as a punitive measure, the Supreme Court has laid down[11] that while no consent of the Judge concerned would be required, the President would not be competent to exercise the power except on the recommendation of the Chief Justice of India.

Territorial Jurisdiction of a High Court.

Except where Parliament establishes a common High Court for two or more States [*Art.* 231] or extends the jurisdiction of a High Court to a Union Territory, the jurisdiction of the High Court of a State is co-terminous with the territorial limits of that State.[12]

As has already been stated, Parliament has extended the jurisdiction of some of the High Courts to their adjoining Union Territories, by enacting the States Reorganisation Act, 1956. Thus, the jurisdiction of the Calcutta High Court extends to the Andaman and Nicobar Islands; that of the Kerala High Court extends to the Lakshadweep [see Table XVIII].

Ordinary Jurisdiction of High Courts.

The Constitution does not make any provision relating to the general jurisdiction of the High Courts, but maintains their jurisdiction as it existed at the commencement of the Constitution, with this improvement that any restrictions upon their jurisdiction as to revenue matters that existed prior to the Constitution shall no longer exist [*Art.* 225].

The existing jurisdictions of the High Courts are governed by the Letters Patent and Central and State Acts; in particular, their civil and criminal jurisdictions are primarily governed by the two Codes of Civil and Criminal Procedure.

(a) Original.

(a) The High Courts at the three Presidency towns of Calcutta, Bombay and Madras had an original jurisdiction, both civil and criminal, over cases arising within the respective Presidency towns. The original *criminal* jurisdiction of the High Courts has, however, been completely taken away by the Criminal Procedure Code, 1973.[13]

Though City Civil Courts have also been set up to try civil cases within the same area, the original civil jurisdiction of these High Courts has not altogether been abolished but retained in respect of actions of higher value.

(b) The appellate jurisdiction of the High Court, similarly, is both civil and criminal.

(b) Appellate.

(I) On the civil side, an appeal to the High Court is either a First appeal or a Second appeal.

(i) Appeal from the decisions of District Judges and from those of Subordinate Judges in cases of a higher value (broadly speaking), lie direct to the High Court, on questions of fact as well as of law.

(ii) When any Court subordinate to the High Court (*i.e.*, the District Judge or Subordinate Judge) decides an appeal from the decision of an inferior Court, a second appeal lies to the High Court from the decision of the lower appellate Court, but only on question of law and procedure, as distinguished from questions of fact [*s.* 100, C.P. Code].

(iii) Besides, there is a provision for appeal under the Letters Patent of the Allahabad, Bombay, Calcutta, Madras and Patna High Courts. These appeals lie to the Appellate Side of the High Court from the decision of a single Judge of the High Court itself, whether made by such Judge in the exercise of the original or appellate jurisdiction of the High Court.

(II) The criminal appellate jurisdiction of the High Court is not less complicated. It consists of appeals from the decisions of—

(a) A Sessions Judge or an Additional Sessions Judge, where the sentence is of imprisonment exceeding seven years;

(b) An Assistant Sessions Judge, Metropolitan Magistrate or other Judicial Magistrates in certain specified cases other then 'petty' cases [*ss.* 374, 376, 376G, Cr.P.C., 1973]

High Court's Power of superintendence.

Every High Court has a power of superintendence over all Courts and tribunals throughout the territory in relation to which it exercises jurisdiction, excepting military tribunals [*Art.* 227]. This power of superintendence is a very wide power inasmuch as it extends to all Courts as well as tribunals within the State, whether such Court or tribunal[12] is subject to the *appellate* jurisdiction of the High Court or not. Further, this power of superintendence would include a revisional jurisdiction to intervene in cases of gross injustice or non-exercise or abuse of jurisdiction or refusal to exercise jurisdiction, or in case of an error of law apparent on the face of the record, or violation of the principles of natural justice, or arbitrary or capricious exercise of authority, or discretion or arriving at a finding which is perverse or based on no material, or a flagrant or patent error in procedure, even though no appeal or revision against the orders of such tribunal was otherwise available.

Jurisdiction over Administrative Tribunals.

By reason of the extension of Governmental activities and the complicated nature of issues to be dealt with by the administration, many modern statutes have entrusted administrative bodies with the function of deciding disputes and quasi-judicial issues that arise in connection with the administration of such laws, either because the ordinary courts are already overburdened to take up these new matters or the disputes are of such a technical nature that they can be decided only by persons who have an intimate knowledge of the working of the Act under which it arises. Thus, in India, quasi-judicial powers have been vested in administrative authorities such as the Transport Authorities under the Motor Vehicles Act; the Rent Controller under the State Rent Control Acts. Besides, there are special tribunals which are not a part of the judicial administration but have all the 'trappings' of a court. Nevertheless, they are not courts in the proper sense of the term, in view of the special procedure followed by them. All these tribunals have one feature in common, *viz.* that they determine questions affecting the rights of the citizens and their decisions are binding upon them.

Since the decisions of such tribunals have the force or effect of a judicial decision upon the parties, and yet the tribunals do not follow the exact procedure adopted by courts of justice, the need arises to place them under the control of superior courts to keep them within the proper limits of their jurisdiction and also to prevent them from committing any act of gross injustice.

In *England*, judicial review over the decisions of the quasi-judicial tribunals is done by the High Court in the exercise of its power to issue the prerogative writs.

In *India*, there are several provisions in the Constitution which place these tribunals under the control and supervision of the superior courts of the land, *viz.*, the Supreme Court and the High Courts :

(i) If the tribunal makes an order which infringes a fundamental right of a person, he can obtain relief by applying for a writ of *certiorari* to quash that decision, either by applying for it to the Supreme Court under Art. 32 or to the High Court under Art. 226. Even apart from the infringement of the fundamental right, a High Court is competent to grant a writ of *certiorari*, if the tribunal either acts without jurisdiction or in excess of its jurisdiction as conferred by the statute by which it was created or it makes an order contrary to the rules of natural justice or where there is some error of law apparent on the face of its record.

(ii) Besides the power of issuing the writs, every High Court has a general power of superintendence over all the tribunals functioning within its jurisdiction under Art. 227 and this superintendence has been interpreted as both administrative and judicial superintendence. Hence, even where the writ of *certiorari* is not available but a flagrant injustice has been committed or is going to be committed, the High Court may interfere and quash the order of a tribunal under Art. 227.[14]

(iii) Above all, the Supreme Court may grant special leave to appeal from any determination made by any tribunal in India, under Art. 136 wherever there exist extraordinary circumstances calling for interference of the Supreme Court. Broadly speaking, the Supreme Court can exercise this power under Art. 136 over a tribunal wherever a writ for *certiorari* would lie against the tribunal; for example, where the tribunal has either exceeded its jurisdiction or has approached the question referred to it in a manner which is likely to result in injustice or has adopted a procedure which runs counter to the established rules of natural justice. The extraordinary power would, however, be exercised by the Supreme Court in rare and exceptional circumstances and not to interfere with the decisions of such tribunals as a court of appeal.

The Writ Jurisdiction of Supreme Court and High Court.

Besides the above, the Supreme Court as well as the High Courts possess what may be called an extraordinary jurisdiction, under Arts. 32 and 226 of the Constitution, respectively, which extends not only to inferior courts and tribunals but also to the State or any authority or person, endowed with State authority. The peculiarity of this jurisdiction is that being conferred by the Constitution, it cannot be taken away or abridged by anything short of an amendment of the Constitution itself. As has already been pointed out, the jurisdiction to issue writs under these Articles is larger in the case of High Court inasmuch as while the Supreme Court can issue them only where a fundamental right has been infringed, a High Court can issue them not only in such cases but also where an ordinary legal right has been infringed, provided a writ is a proper remedy in such cases, according to well-established principles.

Public interest litigation.—Following English and American decisions, our Supreme Court has admitted exceptions from the strict rules relating to affidavit *locus standi* and the like in the case of a class of litigations, classified as 'public interest litigation' (PIL) *i.e.*, where the public in general are interested in the vindication of some right or the enforcement of some public duty.[15] The High Courts also have started following this practice in their jurisdiction under Art. 226,[16] and the Supreme Court has approved this practice, observing that where public interest is undermined by an arbitrary and perverse executive action, it would be the duty of the High Court to issue a writ.[17]

The Court must satisfy itself that the party bringing the PIL is litigating *bona fide* for public good. It should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The court can examine the previous records of public service rendered by the litigant.[18] An advocate filed a writ petition against the State or its instrumentalities seeking not only compensation to a victim of rape committed by its employees (the railway employees) but also so many other reliefs including eradication of anti-social and criminal activities at the railway stations. The Supreme Court held that the petition was in the nature of a PIL and the advocate could bring in the same for which no personal injury or loss is an essential element.[19]

Control over Subordinate Courts.

As the head of the Judiciary in the State, the High Court has got an administrative control over the subordinate judiciary in the State in respect of certain matters, besides its appellate and supervisory jurisdiction over them. The Subordinate Courts include District Judges, Judges of the City Civil Courts as well as the Metropolitan Magistrates and members of the judicial service of the State.

The control over the Judges of these Subordinate Courts is exercised by the High Courts in the following matters—

(a) The High Court is to be consulted by the Governor in the matter of appointing, posting and promoting District Judges [*Art.* 233].

(b) The High Court is consulted, along with the State Public Service Commission, by the Governor in appointing persons (other than District Judges) to the judicial service of the State [*Art.* 234].

(c) The control over district courts and courts subordinate thereto, including the posting and promotion of, and the grant of leave to, transfers of, disciplinary control over including inquiries, suspension and punishment, and compulsory retirement of, persons belonging to the judicial service and holding any post inferior to the post of a district judge is vested in High Court [*Art.* 235].

Control over the subordinate courts is the collective and individual responsibility of the High Court.[20]

The 42nd, 43rd and 44th Amendments.

The foregoing survey of the jurisdiction of a High Court under the original Constitution was drastically curtailed in various ways, by the Constitution (42nd Amendment) Act, 1976, which has been referred to at the end of Chap. 22 *ante,* in the context of the Supreme Court, but the new provisions in Arts. 226A and 228A which had been inserted by the Constitution (42nd Amendment) Act, 1976, have all been omitted by the 43rd Amendment Act, 1977, *and the original position has been restored*.

In this context, we must mention Arts. 323A-323B, inserted by the 42nd Amendment Act.

Parliament has passed the Administrative Tribunals Act, 1985, implementing Art. 323A, under which the Central Government has set up Central Administrative Tribunals with respect to services under the Union.

As a result, all Courts of law including the High Court shall cease to have any jurisdiction to entertain any litigation relating to the recruitment and other service matters relating to persons appointed to the public services of the Union, whether in its original or appellate jurisdiction. The Supreme Court has, however, been spared its special leave jurisdiction of appeals from these Tribunals, under Art. 136 of the Constitution. But subsequently, the position turned out to be otherwise as the Supreme Court declared the Articles 323-A, Cl. 2(d) and 323-B, Cl. 3(d) and also the "exclusion of jurisdiction" clauses in all the legislations enacted in pursuance of these Articles, unconstitutional to the extent they excluded the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32.[21]

REFERENCES

1. Under this provision, the High Court of Assam (at Gauhati)is the common High Court for Assam, Nagaland, Manipur, Meghalaya, Tripura, Arunachal Pradesh and Mizoram [Table XVIII]; and the Bombay High Court serves both Maharashtra and Goa.
2. By the Constitution (15th Amendment) Act, 1963, the age of retirement of High Court Judges has been raised from 60 to 62.
3. *Supreme Court Advocates* v. *Union of India,* (1993) 4 S.C.C. 441.
4. *Special ReferenceNo. 1 of 1998*, Re : (1998) 7 S.C.C. 739 [9 Judge Bench].
5. This is the salary as enhanced *vide* Act 18 of 1998, s. 7 (w.e.f. 1.1.1996).
6. C.A.D., dated 22-11-1948.
7. Cf. *Gupta* v. *President of India*, AIR 1982 S.C. 149 (7-Judge Bench).
8. *Special Reference No. 1 of 1998,* Re :, (1998) 7 S.C.C. 739.
9. In this context, see *Union of India* v. *Jyoti Prakash*, AIR 1971 S.C. 1093, and the comments of the author thereon, at pp. 246ff. of Vol. G of the Author's *Commentary on the Constitution of India* (6th Ed.)
10. *Statesman,* Calcutta,14-4-1994, 16-4-1994 (p. 5).
11. *S.C. Advocates* v. *Union of India*, (1993) 4 S.C.C. 441 (para 472)—9-Judge Bench.
12. See Table XVII as to the territorial jurisdiction of the several High Courts. Delhi which was under the jurisdiction of the Punjab High Court has now its own High Court since 1996.
13. BASU'S *Criminal Procedure Code* (Prentice-Hall of India, 1979), p. 29.
14. The 42nd Amendment Act, 1976, also took away this jurisdiction of the High Courts over tribunals, under Art. 227(1), by omitting the word 'tribunals' therefrom; but the 44th Amendment Act,1978, has *restored* the word, so that a High Court retains its power of superintendence over any tribunal within its territorial jurisdiction. This jurisdiction of the High Court was taken away in respect of Administrative Tribunals set up under Art. 323A, by the Administrative Tribunals Act, 1985 but the provisions in these Articles and in the legislations enacted in pursuance thereof excluding the jurisdiction of S.C. and H.C.s under Arts. 32 and 226/227 have been declared to be unconstitutional by the Supreme Court in *L. Chandra Kumar* v. *U.O.I.*, (1997) 3 S.C.C. 261 : A.I.R. 1997 S.C. 1125.
15. *People's Union* v. *Union of India,*A.I.R. 1982 S.C. 1473 (para 1).
16. *State of W.B.* v. *Sampat,* A.I.R. 1985 S.C. 195 (para 10).
17. *Chaitanya* v. *State of Karnataka,* A.I.R. 1986 S.C. 825 (para 10).
18. *Raunaq International Ltd.* v. *I.V.R. Construction Ltd.*, (1999) 1 S.C.C. 492 (para 12) : A.I.R. 1999 S.C. 393.
19. *Chairman, Railway Board* v. *Chandrima Das,* (2000) 2 S.C.C. 465.
20. *High Court of Judicature at Bombay* v. *Shirish Kumar Rangrao Patil,*(1997) 6 S.C.C. 339.
21. *L. Chandra Kumar* v. *Union of India,*(1997) 3 S.C.C. 261 : A.I.R. 1997 S.C. 1125.

PART VIII

The Federal System

CHAPTER 24

DISTRIBUTION OF LEGISLATIVE AND EXECUTIVE POWERS

Nature of the Union.

THE nature of the federal system introduced by *our* Constitution has been fully explained earlier (Chap. 5).

To recapitulate its essential features: Though there is a strong admixture of unitary bias and the exceptions from the traditional federal scheme are many, the Constitution introduces a federal system as the basic structure of government of the country. The Union is composed of 28 States[1] and both the Union and the States derive their authority from the Constitution which divides all powers,—legislative, executive and financial, as between them. [The judicial powers, as already pointed out (Chap. 22), are, not divided and there is a common Judiciary for the Union and the States.] The result is that the States are not delegates of the Union and that, though there are agencies and devices for Union control over the States in many matters,—subject to such exceptions, the States are autonomous within their own spheres as allotted by the Constitution, and both the Union and the States are equally subject to the limitations imposed by the Constitution, say, for instance, the exercise of legislative powers being limited by Fundamental Rights.

Thus, neither the Union Legislature (Parliament) nor a State Legislature can be said to be 'sovereign' in the legalistic sense,—each being limited by the provisions of the Constitution effecting the distribution of legislative powers as between them, apart from the Fundamental Rights and other specific provisions restraining their powers in certain matters, *e.g.*, Art. 276(2) [limiting the power of a State Legislature to impose a tax on professions]; Art. 303 [limiting the powers of both Parliament and a State Legislature with regard to legislation relating to trade and commerce]. If any of these constitutional limitations is violated, the law of the Legislature concerned is liable to be declared invalid by the Courts.

The Scheme of Distribution of Legislative Powers.

As has been pointed out at the outset, a federal system postulates a distribution of powers between the federation and the units. Though the nature of distribution varies according to the local and political background in each country, the division, obviously, proceeds on two lines—

(a) The *territory* over which the Federation and the Units shall, respectively, have their jurisdiction.

(b) The *subjects* to which their respective jurisdiction shall extend.

The distribution of legislative powers in *our* Constitution under both heads is as follows:

Territorial Extent of Union and State Legislation.

I. As regards the territory with respect to which the Legislature may legislate, the State Legislature naturally suffers from a limitation to which Parliament is not subject, namely, that the territory of the Union being divided amongst the States, the jurisdiction of each State must be confined to its own territory. When, therefore, a State Legislature makes a law relating to a subject within its competence, it must be read as referring to persons or objects situated within the territory of the State concerned. A State Legislature can make laws for the whole or any part of the State to which it belongs [*Art.* 245(1)]. It is not possible for a State Legislature to enlarge its territorial jurisdiction under any circumstances except when the boundaries of the State itself are widened by an Act of Parliament.

Parliament has, on the other hand, the power to legislate for 'the whole or any part of the territory of India', which includes not only the States but also the Union Territories or any other area, for the time being, included in the territory of India [*Art.* 246(4)]. It also possesses the power of 'extra-territorial legislation' [*Art.* 245(2)], which no State Legislature possesses. This means that laws made by Parliament will govern not only persons and property within the territory of India but also Indian subjects resident and their property situated *anywhere* in the world. No such power to affect persons or property outside the borders of its own State can be claimed by a State Legislature in India.

Limitations to the Territorial Jurisdiction of Parliament.

The plenary territorial jurisdiction of Parliament is, however, subject to some special provisions of the Constitution—

(i) As regards some of the Union Territories, such as the Andaman and *Lakshadweep* group of Islands, Regulations may be made by the President to have the same force as Acts of Parliament and such Regulations may repeal or amend a law made by Parliament in relation to such Territory [*Art.* 240(2)].[2]

(ii) The application of Acts of Parliament to any Scheduled Area may be barred or modified by notifications made by the Governor [*Para* 5 of the 5th Schedule].[2]

(iii) Besides, the Governor of Assam may, by public notification, direct that any other Act of Parliament shall not apply to an autonomous district or an autonomous region in the State of Assam or shall apply to such district or region or part thereof subject to such exceptions or modifications as he may specify in the notification [*Para* 12(1)(b) of the 6th Sch.].[3] Similar power has been vested in the President as regards the autonomous district or region in Meghalaya, Tripura and Mizoram by Paras 12A, 12AA and 12B of the 6th Schedule.

It is obvious that the foregoing special provisions have been inserted in view of the backwardness of the specified areas to which the indiscriminate application of the general laws might cause hardship or other injurious consequences.

Distribution of Legislative Subjects.

II. As regards the *subjects* of legislation, the Constitution adopts from the Government of India Act, 1935, a *threefold* distribution of *legislative* powers between the Union and the States [*Art.* 246]. While in the *United States* and *Australia,* there is only a single enumeration of powers,—only the powers of the Federal Legislature being enumerated,—in *Canada* there is a double enumeration, and the Government of India Act, 1935, introduced a scheme of threefold enumeration, namely, Federal, Provincial and Concurrent. The Constitution adopts this scheme from the Act of 1935 by enumerating possible subjects of legislation under three Legislative Lists in Sch. VII of the Constitution (see Table XIX).[4]

List I or the *Union* List includes (in 2008) 100 subjects over which the Union shall have exclusive power of legislation. These include defence, foreign affairs, banking, insurance, currency and coinage, Union duties and taxes.

List II or the *State* List comprises 61 items or entries over which the State Legislature shall have exclusive power of legislation, such as public order and police, local government, public health and sanitation, agriculture, forests, fisheries, State taxes and duties.

List III gives *concurrent* powers to the Union and the State Legislatures over 52 items, such as Criminal law and procedure, Civil procedure, marriage, contracts, torts, trusts, welfare of labour, economic and social planning and education.

In case of *overlapping* of a matter as between the three Lists, predominance has been given to the Union Legislature, as under the Government of India Act, 1935. Thus, the power of the State Legislature to legislate with respect to matters enumerated in the State List has been made subject to the power of Parliament to legislate in respect of matters enumerated in the Union and Concurrent Lists, and the entries in the State List have to be interpreted accordingly.

In the *concurrent* sphere, in case of repugnancy between a Union and a State law relating to the *same* subject, the former prevails. If, however, the State law was reserved for the assent of the President and has received such assent, the State law may prevail notwithstanding such repugnancy, but it would still be competent for Parliament to override such State law by subsequent legislation [*Art.* 254(2)].[5]

Residuary Powers.

The vesting of residual power under the Constitution follows the precedent of *Canada*, for, it is given to the Union instead of the States (as in the *U.S.A.* and *Australia*). In this respect, the Constitution differs from the Government of India Act, 1935, for, under that Act, the residual powers were vested neither in the Federal nor in the State Legislature, but were placed in the hands of the Governor-General; the Constitution vests the residuary power, *i.e.*, the power to legislate with respect to any matter *not* enumerated in any one of the three Lists,—in the Union legislature [*Art.* 248],[6] and the final determination as to whether a particular matter falls under the residuary power or not is that of the Courts.

It should be noted, however, that since the three Lists attempt at an exhaustive enumeration of all possible subjects of legislation, and the Courts interpret the ambit of the enumerated powers liberally, the scope for the application of the residuary power will be very narrow.[7]

Expansion of the Legislative Powers of the Union under different circumstances.

While the foregoing may be said to be an account of the normal distribution of the legislative powers, there are certain exceptional circumstances under which the above system of distribution is either suspended or the powers of the Union Parliament are extended over State subjects. These exceptional or extraordinary circumstances are—

(a) In the *National Interest.* Parliament shall have the power to make laws with respect to any matter included in the State List, for a temporary period, if the Council of States declares by a resolution of 2/3 of its members present and voting, that it is necessary in the *national* interest that Parliament shall have power to legislate over such matters. Each such resolution will give a lease of one year to the law in question.

A law made by Parliament, which Parliament would not but for the passing of such resolution have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period [*Art.* 249]. The resolution of the Council of States may be renewed for a period of one year at a time.

(b) Under a *Proclamation of Emergency.* While a Proclamation of 'Emergency' made by the President is in operation, Parliament shall have similar power to legislate with respect to State subjects.

A law made by Parliament, which Parliament would not but for the issue of such Proclamation have been competent to make, shall, to the extent of incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period [*Art.* 250].

(c) *By agreement between States.* If the Legislatures of two or more States resolve that it shall be lawful for Parliament to make laws with respect to any matters included in the State List relating to those States, Parliament shall have such power as regards such States. It shall also be open to any other State to adopt such Union legislation in relation to itself by a resolution passed in that behalf in the Legislature of the State. In short, this is an extension of the jurisdiction of Parliament by consent of the State Legislatures [*Art.* 252].[8]

Thus, though Parliament has no competence to impose an estate duty with respect to *agricultural* lands, Parliament, in the Estate Duty Act, 1953, included the agricultural lands situated in certain States, by virtue of resolutions passed by the Legislatures of such States, under Art. 252, to confer such power upon Parliament. That Act has since been repealed.

Other examples of such legislation are: Prize Competition Act, 1955; Urban Land (Ceiling and Regulation) Act, 1976; Water (Prevention and Control of Pollution) Act, 1974.

(d) *To implement Treaties.* Parliament shall have the power to legislate with respect to *any* subject for the purpose of implementing treaties or international agreements and conventions. In other words, the normal distribution of powers will not stand in the way of Parliament to enact legislation for carrying out its international obligations, even though such legislation may be necessary in relation to a State subject [*Art.* 253].

Examples of such legislation are: Geneva Convention Act, 1960; Anti-Hijacking Act, 1982; United Nations (Privileges and Immunities) Act, 1947.

(e) *Under a Proclamation of Failure of Constitutional Machinery in the States.* When such a Proclamation is made by the President, the President may declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament [*Art.* 356(1)(b)].

Interpretation of the Legislative Lists.

The interpretation of over 200 Entries in the three Legislative Lists is no easy task for the Courts and the Courts have to apply various judicial principles to reconcile the different Entries, a discussion of which would be beyond the scope of the present work.[9] Suffice it to say that—

(a) Each Entry is given the widest import that its words are capable of, without rendering another Entry nugatory.[10]

(b) In order to determine whether a particular enactment falls under one Entry or the other, it is the 'pith and substance' of such enactment and not its legislative label that is taken account of.[11] If the enactment substantially falls under an Entry over which the Legislature has jurisdiction, an incidental encroachment upon another Entry over which it had no competence will not invalidate the law.[10]

(c) On the other hand, where a Legislature has no power to legislate with respect to a matter, the Courts will not permit such Legislature to transgress its own powers or to encroach upon those of another Legislature by resorting to any device or 'colourable legislation.'[12]

(d) The motives of the Legislature are, otherwise, irrelevant for determining whether it has transgressed the constitutional limits of its legislative power.[12]

Distribution of Executive Powers.

The distribution of *executive* powers between the Union and the States is somewhat more complicated than that of the legislative powers.

I. In general, it follows the scheme of distribution of the legislative powers. In the result, the executive power of a State is, in the main, co-extensive with its legislative powers,—which means that the executive power of State shall extend only to its own territory and with respect to those subjects over which it has legislative competence [*Art.* 162]. Conversely, the *Union* shall have exclusive executive power over (a) the matters with respect to which Parliament has exclusive power to make laws (*i.e.*, matters in List I of Sch. VII), and (b) the exercise of its powers conferred by any treaty or agreement [*Art.* 73]. On the other hand, a State shall have exclusive executive power over matters included in List II [*Art.* 162].

II. It is in the *concurrent* sphere that some novelty has been introduced. As regards matters included in the Concurrent Legislative List (*i.e.*, List III), the executive function shall *ordinarily* remain with the States, but subject to the provisions of the Constitution or of any law of Parliament conferring such function expressly upon the Union. Under the Government of India Act, 1935, the Centre had only a power to give directions to Provincial Executive to execute a Central law relating to a Concurrent subject. But this power of giving directions proved ineffective; so, the Constitution provides that the Union may, whenever it thinks fit, itself take up the administration of Union laws relating to any Concurrent subject.

In the result, the executive power relating to concurrent subjects remains with the States, except in two cases—

(a) Where a law of Parliament relating to such subjects vests some executive function specifically in the Union, *e.g.*, the Land Acquisition Act, 1894; the Industrial Disputes Act, 1947 [Proviso to Art. 73(1)]. So far as these functions specified in such Union law are concerned, it is the Union and not the States which shall have the executive power while the rest of the executive power relating to the subjects shall remain with the States.

(b) Where the provisions of the Constitution itself vest some executive functions upon the Union. Thus,

(i) The executive power to implement any treaty or international agreement belongs exclusively to the Union, whether the subject appertains to the Union, State or Concurrent List [*Art.* 73(1)(b)].

(ii) The Union has the power to give directions to the State Governments as regards the exercise of their executive power, in certain matters—

(I) *In Normal times:*

(a) To ensure due compliance with Union laws and existing laws which apply in that State [*Art.* 256].

(b) To ensure that the exercise of the executive power of the State does not interfere with the exercise of the executive power of the Union [*Art.* 257(1)].

(c) To ensure the construction and maintenance of the means of communication of national or military importance by the State [*Art.* 257(2)].

(d) To ensure protection of railways within the State [*Art.* 257(3)].

(e) To ensure drawing and execution of schemes specified in the directions to be essential for the welfare of the Scheduled Tribes in the States [*Art.* 339(2)].

(f) To secure the provision of adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups [*Art.* 350A].

(g) To ensure the development of the Hindi language [*Art.* 351].

(h) To ensure that the government of a State is carried on in accordance with the provisions of the Constitution [*Art.* 355].

(II) *In Emergencies:*

(a) During a Proclamation of Emergency, the power of the Union to give directions extends to the giving of directions as to the *manner* in which the executive power of the State is to be exercised, relating to any matter [*Art.* 353(a)]. (so as to bring the State Government under the complete control of the Union, without suspending it).

(b) Upon a Proclamation of failure of constitutional machinery in a State, the President shall be entitled to assume to himself all or any of the executive powers of the State [*Art.* 356(1)].

(III) *During a Proclamation of Financial Emergency:*

(a) To observe canons of financial propriety, as may be specified in the directions [*Art.* 360(3)].

(b) To reduce the salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and High Courts [*Art.* 360(4)(b)].

(c) To require all Money Bills or other Financial Bills to be reserved for the consideration of the President after they are passed by the Legislature of the State [*Art.* 360(4)].

III. While as regards the legislative powers, it is not competent for the Union [apart from *Art.* 252, see *ante*] and a State to encroach upon each other's exclusive jurisdiction by mutual consent, this is possible as regards executive powers. Thus, with the consent of the Government of a State, the Union may entrust its own executive functions relating to any matter to such State Government or its officers [*Art.* 258(1)]. Conversely, with the consent of the Union Government, it is competent for a State Government to entrust any of its executive functions to the former [*Art.* 258A].

IV. On the other hand, under Art. 258(2), a law made by Parliament relating to a Union subject may *authorise* the Central Government to delegate its functions or duties to the State Government or its officers (irrespective of the consent of such State Government).

REFERENCES

1. The creation of Chhatisgarh, Uttaranchal (now Uttarakhand) and Jharkhand States by carving out their territories from the territories of the Madhya Pradesh, the Uttar Pradesh and the Bihar States respectively in 2000 has raised the number of States from 25 to 28.
2. See Author's *Constitutional Law of India* (Prentice-Hall of India, 6th Ed., 1991) pp. 265, 458.
3. *Ibid.*, p. 467.
4. As stated earlier, the distribution does not apply to the Union Territories, in regard to which Parliament is competent to legislate with respect to any subject, including those which are enumerated in the 'State List'.
5. See Author's *Constitutional Law of India* (Prentice-Hall of India, 1991), pp. 281-84.
6. *Ibid.*, p. 279.

7. See *Second Gift Tax Officer* v. *Hazareth*, AIR 1970 S.C. 999; *Union of India* v. *Dhillon*, (1971) 2 S.C.C.779; *Azam* v. *Expenditure Tax Officer*, (1971) 3 S.C.C. 621; *Shorter Constitution of India*, 14th Ed., 2008, Sch. VII, under 'General Rules for interpretation of the Entries' *etc.*
8. See Author's *Constitutional Law of India* (Prentice-Hall of India, 1991), p. 280.
9. *Vide* Author's *Commentary on the Constitution of India*, 5th Ed., Vol. IV, pp. 95 *et seq.* and *Shorter Constitution of India*, 14th Ed., 2008, Sch. VII, under 'General Rules for interpretation of the Entries' *etc.*; *Constitutional Law of India* 6th Ed., pp. 475-500.
10. *State of Bombay* v. *Balsara*, (1951) S.C.R. 682; *Ramakrishna* v. *Municipal Committee*, (1950) S.C.R. 15 (*25*).
11. *Amar Singh* v. *State of Rajasthan*, (1955) 2 S.C.R. 303 (*325*).
12. *K.C.G. Narayana Deo* v. *State of Orissa*, (1954) S.C.R. 1.

CHAPTER 25

DISTRIBUTION OF FINANCIAL POWERS

Need for Distribution of Financial Resources.

NO system of federation can be successful unless both the Union and the States have at their disposal adequate financial resources to enable them to discharge their respective responsibilities under the Constitution.

To achieve this object, *our* Constitution has made elaborate provisions, mainly following the lines of the Government of India Act, 1935, relating to the distribution of the taxes as well as non-tax revenues and the power of borrowing, supplemented by provisions for grants-in-aid by the Union to the States.

Before entering into these elaborate provisions which set up a complicated arrangement for the distribution of the financial resources of the country, it has to be noted that the object of this complicated machinery is an equitable distribution of the financial resources between the two units of the federation, instead of dividing the resources into two watertight compartments, as under the usual federal system. A fitting introduction to this arrangement has been given by our Supreme Court,[1] in these words:

> "Sources of revenue which have been allocated to the Union are not meant entirely for the purposes of the Union but have to be distributed according to the principles laid down by Parliamentary legislation as contemplated by the Articles aforesaid. Thus all the taxes and duties levied by the Union ... do not form part of the Consolidated Fund of India but many of these taxes and duties are distributed amongst the States and form part of the Consolidated Fund of the States. Even those taxes and duties which constitute the Consolidated Fund of India may be used for the purposes of supplementing the revenues of the States in accordance with their needs. The question of distribution of the aforesaid taxes and duties amongst the States and the principles governing them, as also the principles governing grants-in-aid ... are matters which have to be decided by a high-powered Finance Commission, which is a responsible body designated to determine those matters in an objective way... The Constitution-makers realised the fact that those sources of revenue allocated to the States may not be sufficient for their purposes and that the Government of India would have to subsidise their welfare activities... Realising the limitations on the financial resources of the States and the growing needs of the community in a welfare State, the Constitution has made... specific provisions empowering Parliament to set aside a portion of its revenues... for the benefit of the States, not in stated proportions but according to their needs ... The resources of the Union Government are not meant exclusively for the benefit of the Union activities ... In other words, the Union and the States together form one

organic whole for the purposes of utilisation of the resources of territories of India as a whole."

Principles underlying distribution of Tax Revenues..

The Constitution makes a distinction between the legislative power to levy a tax and the power to *appropriate* the proceeds of a tax so levied. In *India*, the powers of a Legislature in these two respects are not identical.

Distribution of Legislative Powers to levy Taxes.

(A) The legislative power to make a law for imposing a tax is divided as between the Union and the States by means of specific Entries in the Union and State Legislative Lists in Sch. VII (see Table XIX). Thus, while the State Legislature has the power to levy an estate duty in respect of agricultural lands [Entry 48 of List II], the power to levy an estate duty in respect of non-agricultural land belongs to Parliament [Entry 87 of List I]. Similarly, it is the State Legislature which is competent to levy a tax on agricultural income [Entry 46 of List II], while Parliament has the power to levy income-tax on all incomes other than agricultural [Entry 82 of List I].

The residuary power as regards taxation (as in general legislation) belongs to Parliament [Entry 97 of List I] and the Gift tax and Expenditure tax have been held to derive their authority from this residuary power. There is no concurrent sphere in the matter of tax legislation.

Before leaving this topic, it should be pointed out that though a State Legislature has the power to levy any of the taxes enumerated in the State Legislative List, in the case of certain taxes, this power is subject to certain limitations imposed by the substantive provisions of the Constitution. Thus—

(a) Professions Tax.

(a) While Entry 60 of List II of Sch. VII authorises a State Legislature to levy a tax on profession, trade, calling or employment, the total amount payable in respect of any one person to the State or any other authority in the State by way of such tax shall not exceed Rs. 2,500[2] *per annum* [*Art.* 276(2)].

(b) Sales Tax.

(b) The power to impose taxes on 'sale or purchase of goods other than newspapers' belongs to the State [Entry 54, List II]. But 'taxes on imports and exports' [Entry 83, List I] and 'taxes on sales in the course of inter-State trade and commerce' [Entry 92A, List I] are exclusive Union subjects. Article 286 is intended to ensure that sales taxes imposed by States do not interfere with imports and exports or inter-State trade and commerce, which are matters of national concern, and should, therefore, be beyond the competence of the States. Hence, certain limitations have been laid down by Art. 286 upon the power of the States to enact sales tax legislation:

1. (a) No tax shall be imposed on sale or purchase which takes place *outside the State*.

(b) No tax shall be imposed on sale or purchase which takes place in *the course of import* into or *export* out of India.[3]

2. In connection with inter-State trade and commerce there are two limitations—

(i) The power to tax sales taking place 'in the course of inter-State trade and commerce'[4] is within the exclusive competence of Parliament [Entry 92A, List I].

(ii) Even though a sale does not take place 'in the course of' inter-State trade or commerce, State taxation would be subject to restrictions and conditions imposed by Parliament if the sale relates to 'goods declared by Parliament to be of *special importance* in inter-State trade and commerce'. In pursuance of this power, Parliament has declared sugar, tobacco, cotton, silk and woollen fabrics to be goods of special importance in inter-State trade and commerce, by enacting the Additional Duties of Excise (Goods of Special Importance) Act, 1957 [*s.* 7], and imposed special restrictions upon the States to levy tax on the sales of these goods.

(c) Tax on Consumption or Sale of Electricity.

(c) Save insofar as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the consumption or sale of electricity (whether produced by a Government or other persons) which is—

(i) consumed by the Government of India, or sold to the Government of India for consumption by that Government; or

(ii) consumed in the construction, maintenance or operation of any railway by the Government of India, or a railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway [*Art.* 287].

(d) Exemption of Union and State properties from mutual taxation.

(d) The property of the Union shall, save insofar as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State [*Art.* 285(1)].

Conversely, the property and income of a State shall be exempt from Union taxation [*Art.* 289(1)]. There is, however, one exception in this case. If a State enters into a trade or business, other than a trade or business which is declared by Parliament to be incidental to the ordinary business of government, it shall not be exempt from Union taxation [*Art.* 289(2)]. The immunity, again, relates to a tax on property. Hence, the property of a State is not immune from customs duty.[1]

Distribution of proceeds of Taxes.

(B) Even though a Legislature may have been given the power to levy a tax because of its affinity to the subject-matter of taxation, the yield of different taxes coming within the State legislative sphere may not be large enough to serve the purposes of a State. To meet this situation, the Constitution makes special provisions:

(i) Some duties are leviable by the Union; but they are to be collected and entirely appropriated by the States after collection.

(ii) There are some taxes which are both levied and collected by the Union, but the proceeds are then assigned by the Union to those States within which they have been levied.

(iii) Again, there are taxes which are levied and collected by the Union but the proceeds are distributed between the Union and the State.

The distribution of the tax-revenue between the Union and the States, according to the foregoing principles, stands as follows:

(A) Taxes belonging to the Union exclusively:

1. Customs. 2. Corporation tax. 3. Taxes on capital value of assets of individuals and Companies. 4. Surcharge on income tax, etc. 5. Fees in respect of matters in the Union List (List I).

(B) Taxes belonging to the States exclusively:

1. Land Revenue. 2. Stamp duty except in documents included in the Union List. 3. Succession duty, Estate duty, and Income tax on *agricultural land.* 4. Taxes on passengers and goods carried on inland waterways. 5. Taxes on lands and buildings, mineral rights. 6. Taxes on animals and boats, on road vehicles, on advertisements, on consumption of electricity, on luxuries and amusements, etc. 7. Taxes on entry of goods into local areas. 8. Sales Tax. 9. Tolls. 10. Fees in respect of matters in the State List. 11. Taxes on professions, trades, etc., not exceeding Rs. 2,500 per annum (List II).

(C) Duties Levied by the Union but Collected and Appropriated by the States:

Stamp duties on bills of Exchange, etc., and Excise duties on medicinal and toilet preparations containing alcohol, though they are included in the Union List and *levied* by the Union, shall be collected by the States insofar as leviable within their respective territories, and shall form part of the States by whom they are collected [*Art.* 268].

(D) Taxes Levied as well as Collected by the Union, but Assigned to the States within which they are Leviable:

(a) Duties on succession to property other than agricultural land. (b) Estate duty in respect of property other than agricultural land. (c) Terminal taxes on goods or passengers carried by railway, air or sea. (d) Taxes on railway fares and freights. (e) Taxes on stock exchange other than stamp duties. (f) Taxes on sales of and advertisements in newspapers. (g) Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce. (h) Taxes on inter-State consignment of goods [*Art.* 269].

(E) Taxes Levied and Collected by the Union and Distributed between Union and the States:

Certain taxes shall be levied as well as collected by the Union, but their proceeds shall be divided between the Union and the States in a certain proportion, in order to effect an equitable division of the financial resources. These are—

(a) Taxes on income *other than on agricultural income* [*Art.* 270].

(b) Duties of excise as are included in the Union List, excepting medicinal and toilet preparations may also be distributed, if Parliament by law so provides [*Art.* 272].

(F) The principal sources of non-tax revenues of the Union are the receipts from—

Distribution of Non-tax Revenues.

Railways; Posts and Telegraphs; Broadcasting; Opium; Currency and Mint; Industrial and Commercial Undertakings of the Central Government relating to the subjects over which the Union has jurisdiction.

Of the Industrial and Commercial Undertakings relating to Central subjects may be mentioned—

The Industrial Finance Corporation; Air India; Indian Airlines; Industries in which the Government of India have made investments, such as the Steel Authority of India; the Hindustan Shipyard Ltd; the Indian Telephone Industries Ltd.

(G) The States, similarly, have their receipts from—

Forests, Irrigation and Commercial Enterprises (like Electricity, Road Transport) and Industrial Undertakings (such as Soap, Sandalwood, Iron and Steel in Karnataka, Paper in Madhya Pradesh, Milk Supply in Mumbai, Deep-sea Fishing and Silk in West Bengal).

Grants-in-Aid.

Even after the assignment to the States of a share of the Central taxes, the resources of all the States may not be adequate enough. The Constitution, therefore, provides that grants-in-aid shall be made in each year by the Union to such States as Parliament may determine to be in need of assistance; particularly, for the promotion of welfare of tribal areas, including special grants to Assam in this respect [*Art.* 275].

Constitution and Functions of the Finance Commission.

Articles 270, 273, 275 and 280 provide for the constitution of a Finance Commission (at five year intervals) to recommend to the President certain measures relating to the distribution of financial resources between the Union and the States,—for instance, the percentage of the net proceeds of income-tax which should be assigned by the Union to the States and the manner in which the share to be assigned shall be distributed among the States [*Art.* 280].

The constitution of the Finance Commission is laid down in Art. 280, which has to be read with the Finance Commission (Miscellaneous Provisions) Act of 1951, which has supplemented the provisions of the Constitution. Briefly speaking, the Commission has to be constituted by the President, every five years. The Chairman must be a person having 'experience in public affairs'; and the other four members must be appointed from amongst the following—

(a) A High Court Judge or one qualified to be appointed as such; (b) a person having special knowledge of the finances and accounts of the Government; (c) a person having wide experience in financial matters and administration; (d) a person having special knowledge of economics.

It shall be the duty of the Commission to make recommendations to the President as to—

(a) the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds;

(b) the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India;

(c) the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Panchayats in the State;[5]

(d) the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Municipalities in the State;[6]

(e) any other matter referred to the Commission by the President in the interests of sound finance.

The First Finance Commission.

The First Finance Commission was constituted in 1951, with Sri Neogy as the Chairman, and it submitted its report in 1953. Government accepted its recommendations which, *inter alia,* were that—

(a) 55 per cent of the net proceeds of income-tax shall be assigned by the Union to the States and that it shall be distributed among the States in the shares prescribed by the Commission.

(b) The Commission laid down the principles for guidance of the Government of India in the matter of making general grants-in-aid to States which require financial assistance and also recommended specific sums to be given to certain States such as West Bengal, Punjab, Assam, during the five years from 1952 to 1957.

The Second Finance Commission.

A Second Finance Commission, with Sri Santhanam as the Chairman, was constituted in 1956. Its report was submitted to Government in September, 1957 and its recommendations were given effect to for the quinquennium commencing from April, 1957.

The Third Finance Commission.

A Third Finance Commission, with Sri A.K. Chanda as its Chairman, was appointed in December, 1960. It submitted its report in 1962.

The Fourth Finance Commission.

The Fourth Finance Commission with Dr. RAJAMANNAR, retired Chief Justice of the Madras High Court, as its Chairman, was constituted in May, 1964.

The Fifth Finance Commission.

A Fifth Finance Commission, headed by Sri Mahavir Tyagi, was constituted in March, 1968, with respect to the quinquennium commencing from 1-4-1969. It submitted its final report in July 1969, and recommended that the States' share of income-tax should be raised to 75 per cent and of Union Excise duties should be raised to 20 per cent.

The Sixth Finance Commission.

The Sixth Finance Commission, headed by Sri Brahmananda Reddy, submitted its Report in October, 1973. This Commission was, for the first time, required to go into the question of the debt position of the States and their non-plan capital gap.

The Seventh Finance Commission.

A Seventh Finance Commission was appointed in June, 1977 in relation to the next quinquennium from 1979, with Sri Shelat, a retired Judge of the Supreme Court as its Chairman. It submitted its report in October, 1978.

The Eighth Finance Commission.

The Eighth Finance Commission was set up in 1982, with ex-Minister, Shri Y.B. Chavan as its head.

The Eighth Finance Commission submitted its report in 1984, but its recommendations, granting moneys to the States, were not implemented by the Government of India, on the ground of financial difficulties and late receipt of the Commission's Report. Obviously, this placed some of the States in financial difficulty and the State of West Bengal raised vehement protest against this unforeseen situation. Responsible authorities in West Bengal threatened litigation but eventually nothing was done presumably because the matter was non-justiciable. Article 280(3) enjoins the Finance Commission to make 'recommendations' to the President and the only duty imposed on the President, by Art. 281, is to lay the recommendations of the Commission before each House of Parliament. It is nowhere laid down in the Constitution that the recommendations of the Commission shall be binding upon the Government of India or that it would give rise to a legal right in favour of the beneficiary States to receive the moneys recommended to be offered to them by the Commission. Of course, non-implementation would cause grave dislocation in States which might have acted upon their anticipation founded on the Commission's Report. The remedy for such dislocation or injustice lies only in the ballot box.

The Ninth Finance Commission.

The Ninth Finance Commission, headed by Shri N.K.P. Salve, submitted its reports in 1988 and 1989; all its recommendations have been accepted by the Government.[7]

The Tenth Finance Commission.

The Tenth Finance Commission was constituted on 16-6-1992, with Shri K.C. Pant as its Chairman. It submitted its report on 26-11-1994.

The Eleventh Finance Commission.

The Eleventh Finance Commission was constituted on 3-7-1998. It submitted its report on 7-7-2000.

The Twelfth Finance Commission

The Twelfth Finance Commission was constituted on 1.11.2002 with Dr. C. Rangarajan as its Chairman. It submitted its report on 17.12.2004.

The Thirteenth Finance Commission

The Thirteenth Finance Commission was constituted on 1.11.2007 with Shri Vijay Kelkar as its Chairman and is expected to submit its report by October, 2009.

Safeguarding the interests of the States in the shared Taxes.

By way of safeguarding the interests of the States in the Union taxes which are divisible according to the foregoing provisions, it is provided by the Constitution [*Art.* 274] that no Bill or amendment which—

(a) varies the rate of any tax or duty in which the States are interested; or

(b) affects the principles on which moneys are distributable according to the foregoing provisions of the Constitution; or

(c) imposes any surcharge on any such tax or duty for the purposes of the Union,

shall be introduced or moved in Parliament except on the recommendation of the President.

Subject to the above condition, however, it is competent for Parliament to increase the rate of any such tax or duty (by imposing a surcharge) for purposes of the Union [*Art.* 271].

Financial control by the Union in Emergencies.

As in the legislative and administrative spheres, so in financial matters, the normal relation between the Union and the States (under Arts. 268-279) is liable to be modified in different kinds of emergencies. Thus,

(a) While a Proclamation of Emergency [*Art.* 352(1)] is in operation, the President may by order direct that, for a period not extending beyond the expiration of the financial year in which the Proclamation ceases to operate, all or any of the provisions relating to the division of the taxes between the Union and the States and grants-in-aid shall be suspended [*Art.* 354]. In the result, if any such order is made by the President, the States will be left to their narrow resources from the revenues under the State List, without any augmentation by contributions from the Union.

(b) While a Proclamation of Financial Emergency [*Art.* 360(1)] is made by the President, it shall be competent for the Union to give directions to the States—

(i) to observe such canons of financial propriety and other safeguards as may be specified in the directions;

(ii) to reduce the salaries and allowances of all persons serving in connection with the affairs of the State, including High Court Judges;

(iii) to reserve for the consideration of the President all money and financial Bills, after they are passed by the Legislature of the State [*Art.* 360]

Borrowing Powers of the Union and the States.

The Union shall have unlimited power of borrowing, upon the security of the revenues of India either within India or outside. The Union Executive shall exercise the power subject only to such limits as may be fixed by Parliament from time to time [*Art.* 292].

The borrowing power of a State is, however, subject to a number of constitutional limitations:

(i) It cannot borrow outside India. Under the *Government of India Act, 1935,* the States had the power to borrow outside India with the consent of the Centre. But this power is totally denied to the States by the Constitution; the Union shall have the sole right to enter into the international money market in the matter of borrowing.

(ii) The State Executive shall have the power to borrow, within the territory of India upon the security of the revenues of the State; subject to the following conditions:

(a) Limitations as may be imposed by the State Legislature.

(b) If the Union has guaranteed an outstanding loan of the State, no fresh loan can be raised by the State without consent of the Union Government.

(c) The Government of India may itself offer a loan to a State, under a law made by Parliament. So long as such a loan or any part thereof remains outstanding, no fresh loan can be raised by the State without the consent of the Government of India. The Government of India may impose terms in giving its consent as above [*Art.* 293].

Demand for more Financial power by States.

Before closing this Chapter, it should be pointed out that there is a growing demand from some of the States for greater financial powers, by amending the Constitution, if necessary, which was stoutly resisted by Prime Minister Desai.[8] There are two relevant considerations on this issue:

(i) The steps taken by Pakistan to make nuclear bombs together with the equivocal conduct of China leave no room for complacence in the matter of defence. Hence, the Union cannot yield to any weakening of its resources that would prejudice the defence potential of the country.[9]

(ii) On the other hand, the welfare activities of the States involving huge expenditure, natural calamities, etc., which could not be fully envisaged in 1950, call for a revision of the financial provisions of the Constitution.

The entire subject of 'Centre-State Relations' has been reviewed by the Sarkaria Commission. Its Report is under consideration by the Government.[10]

REFERENCES

1. *Coffee Board* v. *C.T.O.*, AIR 1971 S.C. 870.
2. The maximum limit of the professions tax has been raised from Rs. 250 to Rs. 2500, by the Constitution (60th Amendment) Act, 1988.
3. *State of J. & K.* v. *Caltex*, AIR 1966 S.C. 1350.
4. In re *Sea Customs Act*, AIR 1963 S.C. 1760 (*1771*).
5. Inserted by the Constitution (73rd Amendment) Act, 1992, w.e.f. 24-4-1993.
6. Inserted by the Constitution (74th Amendment) Act, 1992, w.e.f. 1-6-1993.
7. *Vide* India, 1990, p. 349.
8. Mrs. Gandhi's Second Government has also adhered to the recommendations of the Administrative Reforms Commission that no amendment of the Constitution is necessary to alter the relation between the Centre and the States, on the ground, *inter alia,* that the financial deficiencies of particular States are being periodically examined and provided for by the Finance Commission, by making larger grants to those States from the Union revenues, according to the provisions of the Constitution.
9. For India's Annual Budget and defence expenditure for 2008-2009, see Table I.
10. *Vide* Author's *Comparative Federalism* (Prentice-Hall of India, 1987).

CHAPTER 26

ADMINISTRATIVE RELATIONS BETWEEN THE UNION AND THE STATES

Need for co-ordination between the Units of the Federation.

ANY federal scheme involves the setting up of dual governments and division of powers. But the success and strength of the federal polity depends upon the maximum of co-operation and co-ordination between the governments. The topic may be discussed under two heads:

(a) Relation between the Union and States;

(b) Relation between the States *inter se.*

In the present Chapter the former aspect will be discussed and the inter-State relations will be dealt with in the next Chapter.

(A) TECHNIQUES OF UNION CONTROL OVER STATES

It would be convenient to discuss this matter under two heads—(i) in emergencies; (ii) in normal times.

I. *In Emergencies.* It has already been pointed out that in 'emergencies' the government under the Indian Constitution will work as if it were a unitary government. This aspect will be more fully discussed in Chap. 28.

II. *In Normal Times.* Even in normal times, the Constitution has devised techniques of control over the States by the Union to ensure that the State governments do not interfere with the legislative and executive policies of the Union and also to ensure the efficiency and strength of each individual unit which is essential for the strength of the Union.

Some of these avenues of control arise out of the executive and legislative powers vested in the President, in relation to the States, *e.g.* :

(i) The power to appoint and dismiss the Governor [*Arts.* 155-156]; the power to appoint other dignitaries in the State, *e.g.*, Judges of the High Court; Members of the State Public Service Commission [*Arts.* 217, 317].

(ii) Legislative powers, *e.g.*, previous sanction to introduce legislation in the State Legislature [*Art.* 304, Proviso]; assent to specified legislation which must be reserved for his consideration [*Art.* 31A(1), Prov. 1; 31C, Prov. 288(2)]; instruction of President required for the Governor to make

Ordinance relating to specified matters [*Art.* 213(1), Prov.]; veto power in respect of other State Bills reserved by the Governor [*Art.* 200, Prov. 1].

These having been explained in the preceding Chapters, in the present chapter we shall discuss other specific agencies for Union control, namely:

(i) Directions to the State Government.
(ii) Delegation of Union functions.
(iii) All-India Services.
(iv) Grant-in-aid.
(v) Inter-State Councils.
(vi) Inter-State Commerce Commission [*Art.* 307].

Directions by the Union to State Governments.

The idea of the Union giving directions to the States is foreign and repugnant to a truly federal system. But this idea was taken by the framers of *our* Constitution from the Government of India Act, 1935, in view of the peculiar conditions of this country and, particularly, the circumstances out of which the federation emerged.

The circumstances under which and the matters relating to which it shall be competent for the Union to give directions to a State have already been stated. The sanction prescribed by the Constitution to secure compliance with such directions remains to be discussed.

It is to be noted that the Constitution prescribes a coercive sanction for the enforcement of the directions issued under any of the foregoing powers, namely, the power of the President to make a Proclamation under Art. 356. This is provided in Art. 365 as follows :

Sanction for enforcement of Directions.

> "Where any State has failed to comply with, or to give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution."

And as soon as a Proclamation under Art. 356 is made by the President he will be entitled to assume to himself any of the functions of the State Government as are specified in that Article.

Delegation of Functions.

It has already been stated that with the consent of the Government of a State, President may entrust to that Government executive functions of the Union relating to any matter [*Art.* 258(1)]. While legislating on a Union subject, Parliament may delegate powers to the State Governments and their officers insofar as the statute is applicable in the respective States [*Art.* 258(2)].

Conversely, a State Government may, with the consent of the Government of India, confer administrative functions upon the latter, relating to State subjects [*Art.* 258A].

Thus, where it is inconvenient for either Government to directly carry out its administrative functions, it may have those functions executed through the other Government.

All-India Services.

It has been pointed out earlier that besides persons serving under the Union and the States, there will be certain services 'common to the Union and the States'. These are called 'All-India Services', of which the Indian Administrative Service and the Indian Police Service are the existing examples [*Art.* 312(2)]. But the Constitution gives the power to create additional All-India Services.[1] If the Council of States declares by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interests so to do, Parliament may be law provide for the creation of one or more all-India services common to the Union and the States and regulate the recruitment, and the conditions of service of persons appointed, to any such service [*Art.* 312(1)].[1]

As explained by Dr. Ambedkar in the Constituent Assembly, the object behind this provision for All-India Services is to impart a greater cohesion to the federal system and greater efficiency to the administration in both the Union and the States:

> "The dual policy which is inherent in a federal system is followed in all federations by a dual service. In all Federations, there is a Federal Civil Service and a State Civil Service. The Indian Federation, though a dual polity, will have a dual service, but with one exception. It is recognised that in every country there are certain parts in its administrative set-up which might be called strategic from the point of view of maintaining the standard of administration... There can be no doubt that the standard of administration depends upon the calibre of the civil servants who are appointed to these strategic posts... The Constitution provides that without depriving the States of their right to form their own civil services there shall be an all-India Service, recruited on an all-India basis with common qualifications, with uniform scale of pay and members of which alone could be appointed to these strategic posts throughout the Union."

Grant-in-Aid.

As stated earlier, Parliament is given power to make such grants as it may deem necessary to give financial assistance to any State which is in need of such assistance [*Art.* 275]

By means of the grants, the Union would be in a position to correct inter-State disparities in financial resources which are not conducive to an all-round development of the country and also to exercise control and co-ordination over the welfare schemes of the States on a national scale.

Besides this general power to make grants to the States for financial assistance, the Constitution provides for specific grants on two matters: (a) For schemes of development, for welfare of Scheduled Tribes and for raising the level of administration of Scheduled Areas, as may have been undertaken by a State with the approval of the Government of India. (b) To the State of Assam, for the development of the tribal Areas in that State [*Provisos.* 1-2, *Art.* 275(1)].

Inter-State Council.

The President is empowered to establish an inter-State Council [*Art.* 263] if at any time it appears to him that the public interests would be served thereby. Though the President is given the power to define the nature of the duties to be performed by the Council, the Constitution outlines the three-fold duties that may be assigned to this body. One of these is—

"the duty of *inquiring* into and *advising* upon disputes which may have arisen between States."

The other functions of such Council would be to investigate and discuss subjects of common interest between the Union and the States or between two or more States *inter se, e.g.* research in such matters as agriculture, forestry, public health and to make recommendation for co-ordination of policy and action relating to such subject.

In exercise of this power, the President has so far established a Central Council of Health,[2] a Central Council of Local Self-Government,[3] and a Transport Development Council,[4] for the purpose of co-ordinating the policy of the States relating to these matters. In fact, the primary object of an Inter-State Council being co-ordination and federal cohesion, this object has been lost sight of, while creating fragmentary bodies to deal with specified matters relying on the statutory interpretation that the singular 'a' before the word 'Council' includes the plural.

The Sarkaria Commission has recommended the constitution of a permanent inter-State Council, which should be charged with the duties set out in (b) and (c) of Art. 263. Such a Council, consisting of six Union Cabinet Ministers and the Chief Ministers of all the States, has been created in April, 1990.[5]

Inter-State Commerce Commission.

For the purpose of enforcing the provisions of the Constitution relating to the freedom of trade, commerce and intercourse throughout the territory of India [*Arts.* 301—305], Parliament is empowered to constitute an authority similar to the Inter-State Commerce Commission in the *U.S.A.* and to confer on such authority such powers and duties as it may deem fit [*Art.* 307]. No such Commission has, however, been set up.

Extra-constitutional Agencies for setting all-India Problems.

Apart from the above constitutional agencies for Union control over the States, to ensure a co-ordinated development of India notwithstanding a federal system of government, there are some advisory bodies and conferences held at the Union level, which further the co-ordination of State policy and eliminate differences as between the States. The foremost of such bodies is the Planning Commission.

Planning Commission.

Though the Constitution specifically mentions several Commissions to achieve various purposes, the Planning Commission, as such, is not to be found in the Constitution. 'Economic and social planning' is a concurrent legislative power [*Entry* 20, *List* III]. Taking advantage of this Union power, the Union set up a Planning Commission in 1950, but without resorting to legislation. This extra-constitutional and non-statutory body was set up by a resolution (1950) of the Union Cabinet by Prime Minister Nehru with himself as its first Chairman, to formulate an integrated Five Year[6] Plan for economic and social development and to act as an advisory body to the Union Government, in this behalf.

Set up with this definite object, the Commission's activities have gradually been extended over the entire sphere of the administration excluding only defence and foreign affairs, so much so, that a critic has described it as "the economic Cabinet of the country as a whole", consisting of the Prime Minister and encroaching upon the functions of constitutional bodies, such as the Finance Commission[7] and, yet, not being accountable to Parliament. It has built up a heavy bureaucratic organisation[8] which led Pandit Nehru himself to observe[7]—

> "The Commission which was a small body of serious thinkers had turned into a government department complete with a crowd of secretaries, directors and of course a big building."

According to these critics, the Planning Commission is one of the agencies of encroachment upon the autonomy of the States under the federal system. The extent of the influence of this Commission should, however, be precisely examined before arriving at any conclusion. The function of the Commission is to prepare a plan for the "most effective and balanced utilisation of the country's resources", which would initiate "a process of development which will raise living standards and open out to the people new opportunities for a richer and more varied life". It is obvious that the business of the Commission is only to prepare the plans; the implementation of the plans rests with the States because the development relates to mostly State subjects. There is no doubt that at the Union, the Planning Commission has great weight, having the Prime Minister himself as its Chairman. But so far as the States are concerned, the role of the Commission is only advisory. Whatever influence it exerts is only *indirect*, insofar as the States vie with each other in having their requirements included in the national plan. After that is done, the Planning Commission can have no *direct* means of securing the implementation of the plan. If, at that stage, the States are obliged to follow the uniform policy laid down by the Planning Commission, that is because the States cannot do without obtaining financial assistance from the Union.[9] But, strictly speaking, taking advantage of financial assistance involves voluntary element, not coercion, and even in the *United States* the receipt of federal grants-in-aid is not considered to be a subversion of the federal system, even though it operates as an encroachment upon State autonomy, according to many critics.[10]

But there is justification behind the criticism that there is overlapping of work and responsibility owing to the setting up of two high-powered bodies, *viz.*, the Finance Commission and the Planning Commission and the Administrative Reforms Commission has commented upon it.[11] There is, in fact, no natural division between 'plan expenditure' and 'non-plan expenditure'. The anomaly has been due to the fact that the makers of the Constitution could not, at that time, envisage the creation of a body like the Planning Commission which has subsequently been set up by executive order. Be that as it may be, the need for co-ordination between the two Commissions is patent, and, ultimately, this must be taken over by the Cabinet or a body such as the National Development Council of which we shall speak just now, unless the two Commissions are unified,—which would require an amendment of the Constitution because the Finance Commission is mentioned in the Constitution.

National Development Council

The working of the Planning Commission, again, has led to the setting up of another extra-constitutional and extra-legal body, namely, the National Development Council

This Council was formed in 1952, as an adjunct to the Planning Commission, to associate the States in the formulation of the Plans. The functions of the Council are "to strengthen and mobilise the efforts and resources of the nation in support of the plans; to promote common economic policies in all vital spheres and to ensure the balanced and rapid development of all parts of the country", and in particular, are—

(a) to review the working of the National Plan from time to time;

(b) to recommend measures for the achievement of the aims and targets set out in the National Plan.

Since the middle of 1967, all members of the Union Cabinet, Chief Ministers of States, the Administrators of the Union Territories and members of the Planning Commission have been members of this Council.[12]

Besides the Planning Commission, the annual conferences, whose number is legion, held under the auspices of the Union, serve to evolve co-ordination and integration even in the State sphere. Apart from conferences held on specific problems, there are annual conferences at the highest level, such as the Governors' Conference, the Chief Ministers' Conference, the Law Ministers' Conference, the Chief Justices' Conference, which are of no mean importance from the standpoint of the Union-State as well as inter-State relations. As Appleby[8] has observed, it is by means of such contacts rather than by the use of constitutional coercion, that the Union is maintaining a hold over this sub-continent, having 25 autonomous States (now 28):

> "No other large and important national government... is so dependent as India on theoretically subordinate but actually rather *distinct units responsible to a different* political control, for so much of the administration of what are recognised as national programmes of great importance to the nation.
>
> The power that is exercised organically in New Delhi is the uncertain and discontinuous power of prestige. It is influence rather than power. Its method is making plans, issuing pronouncements, holding conferences... Any real power in most of the development field is the personal power of particular leaders and the informal, extra-constitutional, extra-administrative power of a dominant party, coherent and strongly led by the same leaders. Dependence of achievement, therefore, is in some crucial ways, apart from the formal organs of governance, in forces which in the future may take quite different forms." [8]

National Integration Council.

Another non-constitutional body, the National Integration Council, was created in 1986, to deal with welfare measures for the minorities on an all-India basis. The National Front Government revived it in 1990, with a broad-based composition, including not only Union Ministers and Chief Ministers of States, but also representatives of national and regional political parties, labour, women, public figures as well as media representatives. The issues before its first meeting were—

> Communal harmony, increased violence by secessionists, the problems in respect of Punjab, Kashmir, Ram Janambhoomi-Babri Masjid.

(B) CO-OPERATION BETWEEN THE UNION AND THE STATES

Apart from the agencies of federal control, there are certain provisions which tend towards a smooth working of both the Union and State Governments, without any unnecessary conflict jurisdiction. These are—

(i) Mutual delegation of functions.
(ii) Immunity from mutual taxation.

Mutual Delegation of Functions.

(a) As explained already *our* Constitution distributes between the Union and the States not only the legislative power but also the executive power, more or less on the same lines [*Arts.* 73, 162].

The result is that it is not competent for a State to exercise administrative power with respect to Union subjects, or for the Union to take up the administration of any State function, unless authorised in that behalf by any provision in the Constitution. In administrative matters, a rigid division like this may lead to occasional deadlocks. To avoid such a situation, the Constitution has engrafted provisions enabling the Union as well as a State to make a mutual delegation of their respective administrative functions:

(b) As to the delegation of Union functions, there are two methods:

(i) With the *consent* of the State Government, the *President* may, without any legislative sanction, entrust any executive function to that State [*Art.* 258(1)].

(ii) Irrespective of any consent of the State concerned, *Parliament* may, while legislating with respect to Union subject, confer powers upon a State or its officers, relating to such subject [*Art.* 258(2)]. Such delegation has, in short, a statutory basis.

(c) Conversely, with the *consent* of the Government of India, the *Governor* of a State may entrust on the Union Government or its officers, functions relating to a State subject, so far as that State is concerned [*Art.* 258A].

(C) IMMUNITY FROM MUTUAL TAXATION

Need for Mutual immunity for Proper Working of Federal System.

The system of double government set up by a federal Constitution requires, for its smooth working, the immunity of the property of one Government from taxation by another. Though there is some difference between federal Constitutions as to the extent to which this immunity should go, there is an agreement on the principle that mutual immunity from taxation would save a good deal of fruitless labour in assessment and calculation and cross-accounting of taxes between the two governments (Union and State).

This matter is dealt with in Arts. 285 and 289 of *our* Constitution, relating to the immunity of the Union and a State, respectively.

Immunity of Union Property from State Taxation.

The property of the Union shall, save insofar as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a state [*Art.* 285(1)].

Exemption of Property and Income of a State from Union Taxation.

Similarly the property of a State is immune from Union taxation [*Art.* 289(1)]. The immunity, however, does not extend to all Union taxes, as held by *our* Supreme Court[13] but is confined only to such taxes as are levied *on* property. A State is, therefore, not immune from customs duty, which is imposed, not on property, but on the act of import or export of goods.

Not only the 'property' but also the 'income' of a State is exempted from Union taxation. The exemption is, however, confined to the State Government and does not extend to any local authority situated within a State. The above immunity of the income of a State is, again, subject to an overriding power of Parliament as regards any income derived from a commercial activity. Thus—

(a) Ordinarily, the income derived by a State from commercial activities shall be immune from income-tax levied by the Union.

(b) Parliament is, however, competent to tax the income of a State derived from a commercial activity.

(c) If, however, Parliament declares any apparently trading functions as functions 'incidental to the ordinary functions of government', the income from such functions shall be no longer taxable, so long as such declaration stands.[14]

REFERENCES

1. Until 1961, no additional All-India Services were created, but later on several new All-India Services were created [*vide* footnote no. 45 under Chap, 30. *Post*].
2. S.R.O. 1418, dated 9-8-1952; *India, 1959*, p. 146
3. *India, 1957*, p. 398
4. *India, 1979*, p. 352. Also Central Council of Indian Medicine, Central Family Welfare Council [*India, 1982*, pp. 101, 108].
5. *Rep. of the Administrative Reforms Commission* (1969), Vol. 1, pp. 32-34; *the Report of the Sarkaria Commission on Inter-State Relations*, Part I, paras. 9.3.05-06.
6. The current Plan is the 10th Five Year Plan (2002-07)
7. CHANDRA, *Federation in India*, pp. 213 *et seq.*
8. APPLEBY, *Public Administration in India*, p. 22
9. Under the Second Five Year Plan, 70 per cent of the 'revenue expenditure' and nearly the whole of the 'capital expenditure' on the State Plans were financed by grants from the Union (under Art. 275 of the Constitution), known as 'matching grants'.
10. *Vide* BASU'S *Commentary on the Constitution of India*, 5th Ed., Vol. IV, p. 304; *Steward Machine Co. v. Davis*, (1937) 301 U.S. 548.
11. *Rep. of the Administrative Reforms Commission*, Vol. I, pp. 16-19, 26-39.
12. *Statesman*, 18-7-1976, p. 1
13. In re, *Sea Customs Act*, AIR 1963 S.C. 1760.
14. *A.P.S.R.T.C. v. I.T.O.*, AIR 1964 S.C. 1486 (*1491, 1493*).

CHAPTER 27

INTER-STATE RELATIONS

I. INTER-STATE COMITY

Inter-State Comity.

Though a federal Constitution involves the sovereignty of the Units within their respective territorial limits, it is not possible for them to remain in complete isolation from each other and the very exercise of internal sovereignty by a Unit would require its recognition by, and co-operation of, the other Units of the federation. All federal Constitutions, therefore, lay down certain rules of comity which the Units are required to observe, in their treatment of each other. These rules and agencies relate to such matters as—

(a) Recognition of the public acts, records and judicial proceedings of each other.

(b) Extra-judicial settlement of disputes.

(c) Co-ordination between States.

(d) Freedom of inter-State trade, commerce and intercourse.

Full Faith and Credit.

(A) *Recognition of Public Acts, etc.* Since the jurisdiction of each State is confined to its own territory [*Arts.* 162, 245(1)], the acts and records of one State might have been refused to be recognised in another State, without a provision to compel such recognition. The Constitution, therefore, provides that—

> "Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and every State" [Art. 261(1)].

This means that duly authenticated copies of statutes or statutory instruments, judgments or orders of one State shall be given recognition in another State in the same manner as the statutes, etc., of the latter State itself. Parliament has the power to legislate as to the mode of proof of such acts and records or the effects thereof [*Art.* 261(2)].

Prevention and Settlement of Disputes.

(B) *Extra-judicial Settlement of Disputes.* Since the States, in every federation, normally act as independent units in the exercise of their internal sovereignty, conflicts of interest between the units are sure to arise. Hence, in order to maintain the strength of the Union, it is essential that there should be adequate provision for judicial determination of disputes between the units and for settlement of disputes by extra-judicial bodies as well as their prevention by consultation and joint action. While Art. 131 provides for the judicial determination of disputes between States by vesting the Supreme Court with exclusive jurisdiction in the matter, Art. 262 provides for the adjudication of *one class* of such disputes by an extra-judicial tribunal, while Art. 263 provides for the prevention of inter-State disputes by investigation and recommendation by an administrative body. Thus—

(i) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley and also provide for the exclusion of the jurisdiction of all Courts, including the Supreme Court, to entertain such disputes [*Art.* 262].

In exercise of this power, Parliament has enacted the Inter-State Water Disputes Act, 1956, providing for the constitution of an *ad hoc* Tribunal for the adjudication of any dispute arising between two or more States with regard to the waters of any inter-State river or river valley.

(ii) The President can establish an inter-State Council for enquiring into and advising upon inter-State disputes, if at any time it appears to him that the public interests would be served by the establishment of such Council [*Art.* 263(a)].

Inter-State Councils.

(C) *Co-ordination between States.* The power of the President to set up inter-State Councils may be exercised not only for advising upon disputes, but also for the purpose of investigating and discussing subjects in which some or all of the States or the Union and one or more of the States have a common interest. In exercise of this power, the President has already constituted the Central Council of Health, the Central Council of Local Self-Government, the Central Council of Indian Medicine,[1] Central Council of Homeopathy.

In this connection, it should be mentioned that advisory bodies to advise on inter-State matters have also been established under statutory authority:

Zonal Councils.

(*a*) Zonal Councils have been established by the States Reorganisation in Act, 1956 to *advise* on matters of common interest to each of the five zones into which the territory of India has been divided,—Northern, Southern, Eastern, Western and Central.

It should be remembered that these Zonal Councils do not owe their origin to the Constitution but to an Act of Parliament, having been introduced by the States Reorganisation Act, as a part of the scheme of reorganisation of the States with a view to securing co-operation and co-ordination as between the States, the Union Territories and the Union, particularly in respect of economic and social development. The creation of the Zonal Councils was a logical outcome of the reorganisation of the States on a linguistic basis. For, if the cultural and economic affinity of linguistic States with their contiguous States was to be maintained and their common interests were to be served by co-operative action, a common meeting ground of some sort was indispensable. The object of these Councils, as Pandit Nehru envisaged it, is to "develop the habit of co-operative working". The presence of a Union Minister, nominated by the Union Government, in each of these Councils (and the Chief Ministers of the States concerned) also furthers co-ordination and national integration through an extra-constitutional advisory organisation, without undermining the autonomy of the States. If properly worked, these Councils would thus foster the 'federal sentiment' by resisting the separatist tendencies of linguism and provincialism.

(i) The *Central* Zone, comprising the States of Uttar Pradesh, Madhya Pradesh, Chhatisgarh and Uttarakhand.

(ii) The *Northern* Zone, comprising the States of Haryana, Himachal Pradesh, Punjab, Rajasthan, Jammu & Kashmir, and the Union Territories of Delhi & Chandigarh.

(iii) The *Eastern* Zone, comprising the States of Bihar, West Bengal, Orissa, Sikkim and Jharkhand.

(iv) The *Western* Zone, comprising the States of Gujarat, Maharashtra and Goa and the Union Territories of Dadra & Nagar Haveli; Daman & Diu.

(v) The *Southern* Zone, comprising the States of Andhra Pradesh, Karnataka, Tamil Nadu, Kerala, and the Union Territory of Pondicherry.

(vi) The North Estern Zone, comprising the States of Assam, Meghalaya, Nagaland, Manipur, Tripura, Mizoram, Arunachal Pradesh.

Each Zonal Council consists of the Chief Minister and two other Ministers of each of the Sates in the Zone and the Administrator in the case of a Union Territory. There is also provisioin for holding joint meetings of two or more Zonal Councils. The Union Home Minister has been nominated to be the common chairman of all the Zonal Councils.

The Zonal Councils, as already stated, discuss matters of common concern to the States and Territories comprised in each Zone, such as, economic and social planning, border disputes, inter-State transport, matters arising out of the reorganisation of States and the like, and give advice to the Governments of the States concerned as well as the Government of India.[2]

Besides the Zonal Councils, there is a North-Eastern Council, set up under the North-Eastern Coucil Act, 1971, to deal with the common problems of Assam, Meghalaya, Manipur, Nagaland, Tripura, Arunachal Pradesh and Mizoram.

River Board.

(b) The River Boards Act, 1956, provides for the establishment of a River Board for the purpose of advising the Governments interested in relation to the regulation or development of an inter-State river or river valley.

Water Disputes Tribunal.

(c) The inter-State Water Disputes Act, 1956, provides for the reference of an *inter-State* river dispute for arbitration by a Water Disputes Tribunal, whose award would be final according to Art. 262(2).

II. FREEDOM OF INTER-STATE TRADE AND COMMERCE

The great problem of any federal structure is to minimise inter-State barriers as much as possible, so that the people may feel that they are members of one nation, though they may, individually, be residents of any of the Units of the Union. One of the means to achieve this object is to guarantee to every citizen the freedom of movement and residence throughout the country. Our Constitution guarantees this right by Art. 19(1)(d) & (e).

Need for the Freedom of Trade and Commerce.

No less important is the freedom of movement or passage of commodities and of commercial transactions between one part of the country and another. The progress of the country as a whole also requires free flow of commerce and intercourse as between different parts, without any barrier. This is particularly essential in a federal system. This freedom is sought to be secured by the provisions [*Arts.* 301—307] contained in Part XIII of *our* Constitution. These provisions, however, are not confined to *inter-State* freedom but include *intra-State* freedom as well. In other words, subject to the exceptions laid down in this Part, no restrictions can be imposed upon the flow of trade, commerce and intercourse, not only as between one State and another but as between any two points within the territory of India whether any State border has to be crossed or not.

Article 301 thus declares—

> "Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

Art. 303(1) declares that neither the Parliament nor the State Legislature shall have power to make any law giving, or authorising the giving of, any preference to one State over another; or making or authorising the making of, any discrimination between one State and another, in the field of trade, commerce or intercourse. Hence, if a State prohibits the sale of lottery tickets of others and promotes that of its own, it would be discriminatory and violative of Art. 303.[3]

The limitations imposed upon the above freedom by the other provisions of Part XIII are—

(a) Non-discriminatory restrictions may be imposed by Parliament, in the public interest [*Art.* 302].

By virtue of this power, Parliament has enacted the Essential Commodities Act, 1955, which empowers, 'in the interest of the general public', the Central Government to control the production, supply and distribution of certain 'essential commodities', such as coal, cotton, iron and steel, petroleum.

(b) Even discriminatory or preferential provisions may be made by Parliament, for the purpose of dealing with a scarcity of goods arising in any part of India [*Art.* 303(2)].

(c) Reasonable restrictions may be imposed by a State "in the public interest" [*Art.* 304(b)].

(d) Non-discriminatory taxes may be imposed by a State on goods imported from other States or Union Territories, similarly as on *intra-State* goods [*Art.* 304(a)].

(e) The appropriate Legislature may make a law [under *Art.* 19(6)(ii)] for the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

Freedoms under Arts. 19(1)(g) and 301.

Before leaving this topic, we should notice the difference in the scope of the provisions of Arts. 19(1)(g) and 301 both of which guarantee the freedom of trade and commerce.

Though this question has not been finally settled, it may be stated broadly that Art. 19(1)(g) looks at the freedom from the standpoint of the *individual* who seeks to carry on a trade or profession and guarantees such freedom throughout the territory of India subject to reasonable restrictions, as indicated in Art. 19(5). Article 301, on the other hand, looks at the freedom from the standpoint of the movement or passage of commodities or the carrying on of commercial transactions between *one place and another,* irrespective of the individuals who may be engaged in such trade or commerce. The only restrictions that can be imposed on the freedom declared by Art. 301 are to be found in Arts. 302—305. But if either of these freedoms be restricted, the aggrieved individual[4] or even a State[5] may challenge the constitutionality of the restriction, whether imposed by an executive order or by legislation.[4] When there is a violation of Art. 301 or 304, there would ordinarily be an infringement of an individual's fundamental right guaranteed by Art. 19(1)(g), in which case, he can bring an application under Art. 32, even though Art. 301 or 304 is not included in Part III as a fundamental right.[6]

REFERENCES

1. *India*, 1982, p. 101.
2. After a lapse of some three years, sittings of Zonal Councils have been revived from 1978 [STATESMAN, 8-9-1978, p. 9]. Yet, it must be said that this scheme has *not* been fully utilised [see Author's *Comparative Federalism*, 1987, pp. 574ff.].
3. *B.R. Enterprises* v. *State of U.P.*, (1999) 9 S.C.C. 700.
4. *Atiabari Tea Co.* v. *State of Assam*, AIR 1961 S.C. 232; *Automobile Transport* v. *State of Rajasthan*, AIR 1962 S.C. 1406.
5. *State of Rajasthan* v. *Mangilal*, (*1969*) 2 S.C.C. 710 (*713*); *State of Assam* v. *Labanya Prabha*, AIR 1967 S.C. 1574 (*1578*).
6. *Syed Ahmed* v. *State of Mysore*, AIR 1975 S.C. 1443.

CHAPTER 28

EMERGENCY PROVISIONS

FEDERAL government, according to *Bryce,* means weak government because it involves a division of power. Every modern federation, however, has sought to avoid this weakness by providing for the assumption of larger powers by the federal government whenever unified action is necessary by reason of emergent circumstances, internal or external. But while in countries like the *United States* this expansion of federal power takes place through the wisdom of judicial interpretation, in *India,* the Constitution itself provides for conferring extraordinary powers upon the Union in case of different kinds of emergencies. As has been stated earlier, the Emergency provisions of *our* Constitution enable the federal government to acquire the strength of a unitary system whenever the exigencies of the situation so demand.

Different kinds of Emergencies.

The Constitution provides for *three different kinds* of abnormal situations which call for a departure from the normal governmental machinery set up by the Constitution:—*viz.*, (i) An emergency due to war, external aggression or *armed rebellion*[1] [*Art.* 352]. This may be referred to as 'national emergency', to distinguish it from the next category. (ii) Failure of constitutional machinery in the States [*Art.* 356]. (iii) Financial emergency [*Art.* 360].

An 'armed rebellion' poses a threat to the security of the State as distinguished from 'internal disturbance' contemplated under Art. 355.[2]

Where the Constitution simply uses the expression 'Proclamation of Emergency', the reference is [*Art.* 366(18)] to a Proclamation of the first category, *i.e.*, under Art. 352.

42nd and 44th Amendments.

The Emergency provisions in Part XVIII of the Constitution [*Arts.* 352-360] have been extensively amended by the 42nd Amendment (1976) and the 44th Amendment (1978) Acts, so that the *resultant* position may be stated for the convenience of the reader, as follows:

I. A 'Proclamation of Emergency' may be made by the President at any time he is satisfied that the security of India or any part thereof has been threatened by war, external aggression or *armed rebellion*[1] [*Art.* 352]. It may be made even before the *actual occurrence* of any such disturbance, *e.g.*, when external aggression is apprehended.

An 'Emergency' means the existence of a condition whereby the security of India or any part thereof is threatened by war or external aggression or *armed rebellion.*[1] A state of emergency exists under the Constitution when the President makes a 'Proclamation of Emergency'. The actual occurrence of war or any armed rebellion, is not necessary to justify a Proclamation of Emergency of the President. The President may make such a Proclamation if he is satisfied that there is an imminent danger of such external aggression or *armed rebellion.* But no such Proclamation can be made by the President unless the Union Ministers of Cabinet rank, headed by the Prime Minister, recommend to him, *in writing,* that such a Proclamation should be issued [*Art.* 352(3)].

A. Proclamation of Emergency.

While the 42nd Amendment made the declaration immune from judicial review, that fetter has been removed by the 44th Amendment, so that the constitutionality of the Proclamation can be questioned in a Court on the ground of *mala fides*[3].

Every such Proclamation must be laid before both Houses of Parliament and shall cease to be in operation unless it is approved by resolutions of both Houses of Parliament within *one month* from the date of its issue.

Until the 44th Amendment of 1978, there was no Parliamentary control over the revocation of a Proclamation, once the issue of the Proclamation had been approved by resolutions of the Houses of Parliament.

After the 44th Amendment, a Proclamation under Art. 352 may come to an end in the following ways:

How a Proclamation may terminate.

(a) On the expiry of *one* month from its issue, unless it is approved by resolutions of both Houses of Parliament before the expiry of that period. If the House of the People is dissolved at the date of issue of the Proclamation or within one month thereof, the Proclamation may survive until 30 days from the date of the first sitting of the House after its reconstitution, provided the Council of States has in the meantime approved of it by a resolution [*Cl.* (4)].

(b) It will get a fresh lease of six months from the date it is approved by resolutions of both Houses of Parliament [*Cl.* 5], so that it will terminate at the end of six months from the date of last such resolution.

(c) Every such resolution under Cls. (4)-(5), must be passed by either House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting [*Cl.* (6)].

(d) The President must issue a Proclamation of revocation any time that the House of the People passes a resolution *disapproving* of the issue or continuance of the Proclamation [*Cl.* (7)]. For the purpose of convening a special sitting of the House of the People for passing such a resolution of disapproval, not less than 1/10 of the Members of the House may give a notice in writing to the Speaker or to the President (when the House is not in session) to convene a special sitting of the House for this purpose. A special sitting of the House shall be held within 14 days from the date on which the notice is received by the Speaker or as the case may be by the President [*Cl.* (8)].

It may be that an armed rebellion or external aggression has affected only a *part* of the territory of India which is needed to be brought under greater control. Hence, it has been provided, by the 44th Amendment, that a Proclamation under Art. 352 may be made in respect of the whole of India or only a part thereof.

The Executive and the Legislature of the Union shall have extraordinary powers during an emergency.

The effects of a Proclamation of Emergency may be discussed under four heads—(i) Executive; (ii) Legislative.; (iii) Financial; and (iv) As to Fundamental Rights.

(i) *Executive.* When a Proclamation of Emergency has been made, the executive power of the Union shall, during the operation of the Proclamation, extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised [*Art.* 353(a)].

In normal times, the Union Executive has the power to give directions to a State, which includes only the matters specified in Arts. 256-257.

Effects of Proclamation of Emergency.

But under a Proclamation of Emergency, the Government of India shall acquire the power to give directions to a State on '*any*' matter, so that though the State Government will not be suspended, it will be under the complete *control* of the Union Executive, and the administration of the country insofar as the Proclamation goes, will function as under a unitary system with local sub-divisions.

(ii) *Legislative.* (a) While a Proclamation of Emergency is in operation, Parliament may, by law, extend the normal life of the House of the People (5 years) for a period not exceeding one year at a time and not extending in any case beyond a period of 6 months after the Proclamation has ceased to operate [Proviso to *Art.* 83(2), *ante*]. (This power also was used by Mrs. Gandhi in 1976—Act 109 of 1976).

(b) As soon as a Proclamation of Emergency is made, the legislative competence of the Union Parliament shall be automatically widened and the limitation imposed as regards List II, by Art. 246(3), shall be removed. In other words, during the operation of the Proclamation of Emergency, Parliament shall have the power to legislate as regards List II (State List) as well [*Art.* 250(1)]. Though the Proclamation *will not suspend the State* Legislature, it will suspend the distribution of legislative powers between the Union and the State, so far as the Union is concerned,—so that the Union Parliament may meet the emergency by legislation over any subject as may be necessary as if the Constitution were unitary.

(c) In order to carry out the laws made by the Union Parliament under its extended jurisdiction as outlined above, Parliament shall also have the power to make laws conferring powers, or imposing duties (as may be necessary for the purpose), upon the Executive of the Union in respect of any matter, even though such matter normally belonged to State jurisdiction [*Art.* 353(b)].

(iii) *Financial.* During the operation of the Proclamation of Emergency the President shall have the constitutional power to modify the provisions of the Constitution relating to the allocation of financial resources [*Arts.* 268-279] between the Union and the States, by his own Order. But no such Order shall have effect beyond the financial year in which the Proclamation itself ceases to operate, and, further, such Order of the President shall be subject to approval by Parliament [*Art.* 354].

(iv) *As regards Fundamental Rights.* Articles 358-359 lay down the effects of a Proclamation of Emergency upon fundamental rights. As amended up to 1978, by the 44th Amendment Act, the following results emerge—

I. While Art. 358 provides that the State would be free from the limitations imposed by Art. 19, so that these rights would be non-existent against the State during the operation of a Proclamation of Emergency, under Art. 359, the right to *move the Courts* for the enforcement of the rights or any of them, may be suspended, by Order of the President.

II. While Art. 359 would apply to an Emergency declared on any of the grounds specified in Art. 352, *i.e.*, war, external aggression or armed rebellion, the application of Art. 358 is confined to the case of Emergency on grounds of war or external aggression only.

III. While Art. 358 comes into operation automatically to suspend Art. 19 as soon as a Proclamation of Emergency on the ground of war or external aggression is issued, to apply Art. 359 a further Order is to be made by the President, specifying those Fundamental Rights against which the suspension of enforcement shall be operative.

IV. Art. 358 suspends Art. 19; the suspension of enforcement under Art. 359 shall relate only to those Fundamental Rights which are specified in the President's Order, *excepting Arts. 20 and 21.* In the result, notwithstanding an Emergency, access to the Courts cannot be barred to enforce a prisoner's or detenu's right under Art. 20 or 21.[4]

V. Neither Art. 358 nor 359 shall have the effect of suspending the operation of the relevant fundamental right unless the law which affects the aggrieved individual contains a recital to the effect that "such law is in relation to the Proclamation of Emergency". In the absence of such recital in the law itself, neither such law nor any executive action taken under it shall have any immunity from challenge for violation of a fundamental right during operation of the Emergency [*Cl.* (2) of *Art.* 358 and *Cl.* (1B) of *Art.* 359].

Uses of the Emergency Powers.

A. The *first* Proclamation of Emergency under Art. 352 was made by the President on October 26, 1962, in view of the Chinese aggression in the NEFA. It was also provided by a Presidential Order, issued under Art. 359, that a person arrested or imprisoned under the Defence of India Act would not be entitled to move any Court for the enforcement of any of his Fundamental

Rights under Art. 14, 19 or 21. This Proclamation of Emergency was revoked by an order made by the President on January 10, 1968.

B. The *second* Proclamation of Emergency under Art. 352 was made by the President on December 3, 1971 when Pakistan launched an undeclared war against India.

A Presidential Order under Art. 359 was promulgated on December 25, 1974, in view of certain High Court decisions releasing some detenus under the Maintenance of Internal Security Act, 1971 for smuggling operations. This Presidential Order suspended the right of any such detenu to move *any* Court for the enforcement of his fundamental rights under Arts. 14, 21 and 22, for a period of six months or during the continuance of the Proclamation of Emergency of 1971, whichever expired earlier.

Though there was a ceasefire on the capitulation of Pakistan in Bangladesh in December, 1971, followed by the Shimla Agreement between India and Pakistan, the Proclamation of 1971 was continued, owing to the persistence of hostile attitude of Pakistan. It was thus in operation when the third Proclamation of June 25, 1975 was made.

C. While the two preceding Proclamations under Art. 352 were made on the ground of *external* aggression, the *third* Proclamation of Emergency under Art. 352 was made on June 25, 1975, on the ground of "*internal* disturbance".[5]

The "internal disturbance", which was cited in the Press Note relating to the Proclamation, was that 'certain persons have been inciting the Police and the Armed Forces against the discharge of their duties and their normal functioning'.[5] Both the second and third proclamations were revoked on 21st March, 1977.

Internal Disturbance no more ground of Emergency.

It should be noted that after 1978, it is not possible to issue a Proclamation of Emergency on the ground of 'internal disturbance', short of an armed rebellion, for, the words 'internal disturbance' have been substituted by the words 'armed rebellion', by the Constitution (44th Amendment) Act, 1978.[1]

II. The Constitution provides for carrying on the administration of a State in case of a failure of the constitutional machinery.

B. Proclamation of Failure of Constitutional Machinery in a State.

(a) It is a duty of the Union to ensure that the government of every State is carried on in accordance with the provisions of the Constitution [*Art.* 355]. So, the President is empowered to make a Proclamation, when he is satisfied that the Government of a State cannot be carried on in accordance with the provisions of the Constitution, either on the report of the Governor of the State or otherwise [*Art.* 356(1)]. (For uses of this power, see *below.*)

(b) Such Proclamation may also be made by the President where any State has failed to comply with, or to give effect to, any directions given by the Union, in the exercise of its executive power to the State [*Art.* 365].[6]

By such Proclamation, the President may—

(a) assume to himself all or any of the functions of the Executive of the State or of any other authority save the High Court; and

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament. In short, by such Proclamation, the Union would assume control over all functions in the State administration, except judicial.

When the State Legislature is thus suspended by the Proclamation, it shall by competent—

(a) for Parliament to delegate the power to make laws for the State to the President or any other authority specified by him; (b) for the President to authorise, when the House of the People is not in session, expenditure from the Consolidated Fund of the State pending the sanction of such expenditure from Parliament; and (c) for the President to promulgate Ordinances for the administration of the State when Parliament is not in session [Art. 357].

The duration of such Proclamation shall ordinarily be for *two* months. If, however, the Proclamation was issued when the House of the People was dissolved or dissolution took place during the period of the two months above-mentioned, the Proclamation would cease to operate on the expiry of 30 days from the date on which the reconstituted House of the People first met, unless the Proclamation is approved by Parliament. The two months' duration of such Proclamation can be extended by resolutions passed by both Houses of Parliament for a period of six months at a time, subject to a maximum duration of three years [*Art.* 356(3)-(4)]; but if the duration is sought to be extended beyond *one* year, two other conditions, as inserted by the 44th Amendment Act, 1978, have to be satisfied, namely, that—

Conditions for extension of duration beyond one year.

(a) a Proclamation of Emergency is in operation, in the whole of India or as the case may be, in the whole or any part of the State, at the time of the passing of such resolution, and

(b) the Election Commission certifies that the continuance in force of the Proclamation approved under Cl. (3) during the period specified in such resolution is necessary on account of difficulties in holding general elections to the Legislative Assembly of the State concerned.

By the 42nd Amendment, 1976, the President's satisfaction for the making of a Proclamation under Art. 356 had been made immune from judicial review; but the 44th Amendment of 1978 has removed that fetter, so that the Courts may now interfere if the Proclamation is *mala fide*[3] or the reasons disclosed for making the Proclamation have no reasonable nexus with the satisfaction of the President.[3]

Judicial Review.

The Author's views expressed above have been upheld by the Supreme Court in *S.R. Bommai's* case[7] where a nine-Judge Bench held that the validity of a Proclamation under Art. 356 can be judicially reviewed to examine (i) whether it was issued on the basis of any material, (ii) whether the material was relevant, (iii) whether it was issued *mala fide*.

The Proclamation in case of failure of the constitutional machinery differs from a Proclamation of 'Emergency' on the following points:

Arts. 352 and 356 compared.

(i) A Proclamation of Emergency may be made by the President only when the *security* of India or any part thereof is threatened by war, external aggression or armed rebellion. A Proclamation in respect of failure of the constitutional machinery may be made by the President when the constitutional government of State cannot be carried on for any reasons, not necessarily connected with *war* or *armed rebellion*.

(ii) When a Proclamation of Emergency is made, the Centre shall get no power to *suspend* the State Government or any part thereof. The State Executive and Legislature would continue in operation and retain their powers. All that the Centre would get are *concurrent* powers of legislation and administration of the State.

But under a Proclamation in case of failure of the constitutional machinery, the State Legislature would be suspended and the executive authority of the State would be assumed by the President in whole or in part. [This is why it is popularly referred to as the imposition of the '*President's rule*'.]

(iii) Under a Proclamation of Emergency, Parliament can legislate in respect of State subjects only by itself; by under a Proclamation of the other kind, it can delegate its powers to legislate for the State,—to the President or any other authority specified by him.

(iv) In the case of a Proclamation of failure of constitutional machinery, there is a maximum limitation to the power of Parliament to extend the operation of the Proclamation, namely, three years [*Art.* 356(4), *Proviso* 1], but in the case of a Proclamation of Emergency, it may be continued for a period of six months by each resolution of the Houses of Parliament approving its continuance, so that if Parliament so approves, the Proclamation may be continued indefinitely as long as the Proclamation is not revoked or the Parliament does not cease to make resolutions approving its continuance [*new Cl.* (5) to *Art.* 352, inserted by the 44th Amendment Act, 1978].

Use of the Power.

It is clear that the power to declare a Proclamation of failure of constitutional machinery in a State has nothing to do with any external aggression or armed rebellion; it is an extraordinary power of the Union to meet a *political* breakdown in any of the units of the federation [or the failure by such Unit to comply with the federal directives (*Art.* 365)], which might affect the national strength. It is one of the coercive powers at the hands of the Union to maintain the democratic form of government, and to prevent factional strifes from paralysing the governmental machinery, in the States. The importance of this power in the political system of India can hardly be overlooked in view of the fact that it has been used not less than 108 times during the first 50 years of the working of the Constitution (till March 2001).

For details see Table XXI.

Frequent and improper use of the power under Art. 356, deprecated.

From the foregoing history of the use of the power conferred upon the Union under Art. 356, it is evident that it is a drastic coercive power which takes nearly the substance away from the normal federal polity prescribed by the Constitution. It is, therefore, to be always remembered that the provision for such drastic power was defended by Dr. Ambedkar in the Constituent Assembly[8] on the plea that the use of this drastic power would be a *matter of the last resort:*

> . . . the proper thing we ought to expect is that such articles will never be called into operation and *that they would remain a dead-letter.* If at all they are brought into operation, I hope the President who is endowed with this power *will take proper precautions* before actually suspending the administration of the Province.

It is natural, therefore, that the propriety of the use of this provision (which was envisaged by Dr. B.R. Ambedkar[8] to 'remain a dead-letter'), on numerous occasions (more than any other provision of the Constitution), has evoked criticism from different quarters. The judgment of the Supreme Court in the *Rajasthan* case[6] also did not lay down the law correctly. The views of the Author were expressed in detail in the 16th Edition of this book (at pp. 336-37). In view of *S.R. Bommai's* case[7] (nine-Judge Bench) the comments have been replaced by the law as declared by the Supreme Court, which affirm the Author's view.

Power under Art. 356 must be used rarely.

In *S.R. Bommai's* case[7] the Court has clearly subscribed to the view that the power under Art. 356 is an exceptional power and has to be resorted to only occasionally to meet the exigencies of special situations. The Court quoted the Sarkaria Commission Report to give examples of situations when such power should *not* be used. It made it clear that Art. 356 cannot be invoked for superseding a duly constituted ministry and dissolving the Assembly on the sole ground that in the elections to the Lok Sabha, the ruling party in the State suffered a massive defeat.

After *Bommai's* case[7] it is settled that the Courts possess the power to review the Proclamation on the grounds mentioned above [see under "JUDICIAL REVIEW", *ante*]. This will surely have a restraining effect on the tendency to use the power on flimsy grounds.

President not to take irreversible steps under Art. 356(1) (a), (b) & (c).

In *S.R. Bommai's* case[7] it has been pronounced that till the Proclamation is approved by both Houses of Parliament, it is not permissible for the President to take any irreversible action under Cls. (a), (b) and (c) of Art. 356(1). Hence the Legislative Assembly of a State cannot be dissolved before the Proclamation is approved by both Houses of Parliament.

Court's Power to restore *status quo ante.*

If the Court holds the Proclamation to be invalid then in spite of the fact that it has been approved by the Parliament, the Court has the power to restore, in its discretion, *status quo ante, i.e.* the Court may order that the dissolved Ministry and Assembly will be revived.[7]

Illustration of cases where resort to Art. 356 would not be proper

Some of the situations which do *not* amount to failure of constitutional machinery are given below. They are based on the report of the Sarkaria Commission and have the approval of the Court in *S.R. Bommai's* case.[9]

(1) a situation of maladministration in a State, where a duly constituted ministry enjoys support of the Assembly.

(2) where a Ministry resigns or is dismissed on losing majority support and the Governor recommends imposition of President's Rule without exploring the possibility of installing an alternative government.

(3) where a Ministry has not been defeated on the floor of the House, the Governor on his subjective assessment recommends supersession and imposition of President's Rule.

(4) where in general elections to the Lok Sabha the ruling party in the State has suffered a massive defeat.

(5) where there is situation of internal disturbance but all possible measures to contain the situation by the Union in discharge of its duty, under Art. 355, have not been exhaused.

(6) where no prior warning or opportunity is given to the State Government to correct itself in cases where directives were issued under Arts. 256, 257 etc.

(7) where the power is used to sort out intra-party problems of the ruling party.

(8) the power cannot be legitimately exercised on the sole ground of stringent financial exigencies of the State.

(9) the power cannot be invoked merely on the ground that there are serious allegations of corruption against the Ministry.

(10) exercise of the power for a purpose extraneous or irrelevant to those which are permitted by the Constitution would be vitiated by legal *mala fides*.

Proper occasions for use suggested.

A proper occasion for use of this power would, of course, be when a Ministry *resigns* after defeat in the Legislature and no other Ministry commanding a majority in the Assembly can at once be formed. Dissolution of the Assembly may be a radical solution, but, that being expensive, a resort to Art. 356 may be made to allow the state of flux in the Assembly to subside so as to obviate the need for a dissolution, if possible. A similar situation would arise where the party having a majority *declines* to form a Ministry and the Governor fails in his attempt to find a coalition Ministry. Another obviously proper use is mentioned in Art. 365 of the Constitution itself; but curiously, none of the numerous past occasions *specifically* refers to this contingency. The provision in Art. 365 relates to the failure of a State Government to carry out the directives of the Union Government which the latter has the authority under the Constitution to issue (*e.g.*, under Art. 256;

257). The Union may also issue such a directive under the implied power conferred by the latter part of Art. 355, "to ensure that the government of every State is carried on in accordance with the provisions of this Constitution".[6]

Effect of 44th Amendment on Art. 356.

The only change that the 44th Amendment Act, 1978 (sponsored by the Janata Government), has made in this Article, is to substitute Cl. (5) to limit the duration of a Proclamation made under Art. 356 to a period of *one year* unless a Proclamation of Emergency under Art. 352 is in operation and the Election Commission certifies that it is not possible to hold elections to the Legislative Assembly of the State concerned immediately, in which case, it may be extended up to three years, by successive resolutions for continuance being passed by both Houses of Parliament.

It is to be noted that the foregoing amendment has not specified any conditions or circumstances under which the power under Art. 356 can be used. Hence, in the light of the *Rajasthan decision,*[6] no legal challenge could be offered when Mrs. Gandhi repeated the Janata experiment in February, 1980, in the same nine States, on the same ground, *viz.*, *that* the Janata Party, which was in power in *those* States, was routed in the *Lok Sabha* election.

Proclamation of Financial Emergency.

III. If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect [*Art.* 360(1)].

The consequences of such a declaration are :

(a) During the period any such Proclamation is in operation, the executive authority of the Union shall extend to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions.

(b) Any such direction may also include—

(i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State;

(ii) a provision requiring all Money Bills or other financial Bills to be reserved for the consideration of the President after they are passed by the Legislature of the State.

(c) It shall be competent for the President during the period that any such Proclamation is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts [*Art.* 360(3)-(4)].

The duration of such Proclamation will be similar to that of a Proclamation of Emergency, that is to say, it shall ordinarily remain in force for a period of *two* months, unless before the expiry of that period, it is approved by resolutions of both Houses of Parliament. If the House of the

People is dissolved within the aforesaid period of two months, the Proclamation shall cease to operate on the expiry of thirty days from the date on which the House of the People first sits after its reconstitution, unless before the expiry of that period of thirty days it has been approved by both Houses of Parliament. It may be revoked by the President at any time, by making another Proclamation.

No use of Art. 360 has ever been made.

REFERENCES

1. Since the amendment of Art. 352 in 1978, it is no longer possible to make a Proclamation of Emergency, on the ground of mere 'internal disturbance' which does not constitute an 'armed rebellion'.
2. *Naga People's Movement of Human Rights* v. *Union of India,* (1998) 2 S.C.C. 109 (paras 31 and 32) : A.I.R. 1998 S.C. 431.
3. Cf. *State of Rajasthan* v. *Union of India*, AIR 1977 S.C. 1361 (paras 124, 144); *Minerva Mills* v. *Union of India*, AIR 1980 S.C. 1789 (paras 103-04); *S.R. Bommai* v. *Union of India*, (1994) 3 S.C.C. 1.
4. This amendment, saving Arts. 20 and 21 from the mischief of Art. 359, has been made by the 44th Amendment Act, 1978 in order to *supersede* the view taken in the case of *A.D.M.* v. *Shukla*, AIR 1976 S.C. 1207, that when Art. 21 is suspended by an Order under Art. 359, the person imprisoned or detained "loses his *locus standi* to regain his liberty on *any* ground".
5. An official version of the reasons which impelled Mrs. Gandhi to assume that 'the security of India was threatened by internal disturbances' may be had from *India, 1976,* pp. i-ii. This Proclamation was revoked on March 21, 1977.
6. *State of Rajasthan* v. *Union of India*, AIR 1977 S.C. 1361 (paras 58-59).
7. *S.R. Bommai* v. *Union of India,* (1994) 3 S.C.C. 1.
8. C.A. Debates IX, p. 177.
9. *Ibid.,* f.n. 7, para 82.

PART IX

Miscellaneous

CHAPTER 29

RIGHTS AND LIABILITIES OF THE GOVERNMENT AND PUBLIC SERVANTS

Property of the Union and the States.

OUR Constitution views the Union and the States as juristic persons, capable of owning and acquiring property, making contracts, carrying on trade or business, bringing and defending legal actions, just as private persons, subject to modifications specified in the Constitution itself.

The Union and a State can acquire property in several ways—

(a) *Succession.* Broadly speaking, the property, assets, rights and liabilities that belonged to the Dominion of India or a Governor's Province or an Indian State at the commencement of the Constitution devolved by virtue of the Constitution, on the Union or the corresponding State under the Constitution [*Arts.* 294-295].

(b) *Bona Vacantia.* Any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or as the case may be, to the Ruler of an Indian State by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall, if it is property situate in a State, vest in such State, and shall in any other case, vest in the Union [*Art.* 296]. Thus, the disputed property of a person dying a civil death (not heard of for more than seven years) without leaving any heir, would vest in the Gaon Sabha and should be recorded in its name even if no objection has been filed by it.[1]

(c) *Things underlying the Ocean.* All lands, minerals and other things of value underlying the ocean within the territorial waters of India shall vest only in the Union [*Art.* 297].

(d) *Compulsory Acquisition or Requisition by Law.* Both the Union and State Legislatures shall be competent to compulsorily acquire or requisition property by making law, under Entry 42, List III, Sch. VII.

The constutional obligation to pay compensation has been abolished, by the omission of Art. 31(2) by the 44th Amendment Act, 1978.

(e) *Acquisition under Executive Power.* The Government of India or a State may make contracts and acquire property, say by purchase or exchange, just as a private individual, in exercise of their respective powers, and for the purposes of their respective Governments [*Arts.* 298] and the decision of the government in granting contracts/licences to private bodies/companies can be questioned only the grounds of bad faith, based on irrational or irrelevant considerations, non-compliance with the prescribed procedure or violation of any constitutional or statutory provision.[2]. But for compulsorily taking a person's property, a *law* will be required to authorise it [*Art.* 300A].

Power to carry on Trade.

The Union or a State Government is competent to carry on *any* trade or business and make contracts for that purpose, in exercise of its executive power. Such business shall, however, be subject to regulation by the competent Legislature. That is to say, if the Union Government takes up a business relating to a subject (say, agriculture) which is included in the State List, the business will be subject to the legislative jurisdiction of the State Legislature [*Art.* 298, *Prov.* (a)].

The Union or a State, while legislating with respect to a trade or business carried on by itself, is immune from a constitutional limitation to which it would have been otherwise subject. If an ordinary law excludes a citizen from carrying on a particular business, wholly or partially, the *reasonableness* of such law has to be tested under Art. 19(6). Thus, if the State creates a monopoly in favour of a private trade without any reasonable justification, such law is liable to be held unconstitutional by the Courts. But if a law creates a monopoly in favour of the State itself as a trader, whether to the partial or complete exclusion of citizens,[3] the reasonableness of such law cannot be questioned by the Courts [*Exception* (ii) to *Art.* 19(6)].

In short, it is competent for the Union or a State not only to enter into a trade but also to create a monopoly in its own favour in respect of such trade. This is what is popularly known as the 'nationalisation' of a trade.[4]

Power to borrow Money.

The power of either Government to take loans has already been dealt with.

Formalities for Government Contracts.

As stated already, both the Union and State Governments have the power to enter into contracts like private individuals, in relation to the respective spheres of their executive power. But this contractual power of the Government is subject to some special formalities required by the Constitution, in addition to those laid down by the Law of Contract which governs any contract made in India.

The reason for imposing these special conditions is that contracts by Government raise some problems which do not or cannot possibly arise in the case of contracts entered into by private persons. Thus, there should be a definite procedure according to which contracts must be made by its agents, in order to bind the Government; otherwise public funds may be depleted by clandestine contracts made by any and every public servant. The formalities for contracts made in the exercise of the executive power of the Union or of a State, as laid down in Art. 299, are that the contract—

(a) must be executed by a person duly authorised by the President or Governor, as the case may be;

(b) must be executed by such person 'on behalf of' the President or Governor, as the case may be;

(c) must be 'expressed to be made by' the President or Governor, as the case may be.

If *any* of these conditions are not complied with, the contract is not binding on or enforceable *against* the Government,[5] though a suit may lie against the officer who made the contract, in his personal capacity.

Suability of the Union and a State.

The right of the Government to sue and its liability to be sued, like a private individual in the ordinary Courts, is also subject to certain special considerations.

Article 300(1) of the Constitution says—

> "The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted."

This Article, however, does not give rise to any cause of action, but merely says that the State can sue or be sued, as a juristic personality, in matters where a suit would lie against the Government had not the Constitution been enacted, subject to legislation by the appropriate Legislature. No such legislation has, however, been undertaken so far. For the substantive law as to the liability of the State, therefore, we have to refer to the law as it stood before the commencement of the Constitution.

I. *Right to Sue.*

So far as the right to sue is concerned, the Government of India may sue by the name of the 'Union of India', while a State may sue by the name of that State, *e.g.*, 'State of Bihar'. Either Government may sue not only a private person but also another Government. Thus, the Union may bring a suit against one or more States; while a State may sue another State or the Union [*Art.* 131]. It is to be noted that when the suit is against a private individual, the suit will have to be instituted in the Court of the lowest jurisdiction, according to the law of procedure; but in the case of a suit between two Governments, it must be instituted in the highest tribunal, namely, the Supreme Court, which has exclusive original jurisdiction over such federal litigation.

II. *Liability to be Sued.*

In this matter, a distinction is to be made between contractual liability and the liability for torts or civil wrongs, because such distinction has been observed in India since the days of the East India Company, up to the commencement of the Constitution, and that position is maintained by Art. 300 of the Constitution, subject to legislation by Parliament.

(a) *Contract.* In India, direct suit had been allowed against the East India Company, the Secretary of State or the existing Governments in matters of contract, instead of a petition of right by which a British subject sought relief from the Crown, as a matter of grace. The Government of India Acts expressly empowered the Government to enter into contracts with private individuals and the corresponding provision in the Constitution in Art. 299(1) maintains that position.

Subject to the formalities prescribed by Art. 299 and to statutory conditions or limits, the contractual liability of the State, under *our* Constitution, is the same as that of an individual under the ordinary law of contract.

(b) *Torts.* The liability of the State under the existing law, for actionable wrongs committed by its servants, cannot be so simply stated as in the case of contracts. The state of the law is unnecessarily complicated by reason of its being founded on the position of the British Crown under the Common Law and of the East India Company upon its supposed representation of the sovereignty of the Crown, both of which have become archaic, owing to the changes in history and law.

Even in *England*, the Common Law maxim that the 'King can do no wrong' has been superseded by the Crown Proceedings Act, 1947. Nevertheless, in the absence of any such corresponding legislation, Courts in India have no alternative than to follow the existing case-law which is founded on the old English theory of immunity of the State, founded on the maxim 'King can do no wrong'.

The existing law in India, thus, draws a distinction between the sovereign and non-sovereign functions of the Government and holds that Government cannot be sued for torts committed by the Government or its officers in the exercise of its 'sovereign' functions.

Thus, it has been held—

(A) No action lies against the Government for injury done to an individual *in the course of exercise* of the *sovereign functions* to the Government, such as the following:

(i) Commandeering goods during war; (ii) making or repairing a military road; (iii) administration of justice; (iv) improper arrest, negligence or trespass by Police officers; (v) wrongs committed by officers in the performance of duties imposed upon them by the Legislature, unless, of course, the statute itself prescribes the limits or conditions under which the executive acts are to be performed; or the wrongful act was expressly authorised or ratified by the State; (vi) loss of movables from Government custody owing to negligence of officers; (vii) payment of money in custody of Government to a person other than the rightful owner, owing to negligence of an officer in the exercise of statutory duty, where Government does not derive any benefit from such transaction, *e.g.*, by a Treasury Officer paying money to a wrong person on a forged cheque owing to negligence in performing his statutory duty to compare the signature.

But gradually the ratio of *Kasturi Lal's* case and the list of sovereign functions is being limited. The Supreme Court has adopted a pro-people approach. In *Rudul Shah*[7] in a writ petition the Court ordered compensation to be paid for deprivation of liberty. In *Nagendra Rao*[8] the Supreme Court observed that no civilised system can permit an executive to play with the people of a country and claim to be sovereign. To place the State above the law is unjust and unfair to the citizen. In the modern sense the distinction between sovereign and non-sovereign functions does not exist. The ratio of *Kasturi Lal*[6] is available to those rare and limited cases where the statutory authority acts as a delegate of such functions for which it cannot be sued in a Court of law.

The theory of sovereign power, propounded in *Kasturi Lal* case has yielded to new theories and is no longer available in a welfare state in which functions of the government are manifold, all of which cannot be said to be the activities relating to exercise of sovereign powers. Running of a railway is a commercial activity. Establishing the Yatri Niwas at various railway stations to provide lodging and boarding facilities to the passengers on payment of charges is a part of commercial activity of the Union of India which cannot be equated with the exercise of sovereign power. The employees deputed to run the Railways and to manage the establishment, including the railway stations and the Yatri Niwas, are essential components of the government machinery carrying on commercial activity. If any of such employees commits an act of tort, the Union Government can be held liable in damages to the person wronged by those employees. As observed in *Common Cause, A Registered Society* v. *Union of India,* (1999) 6 SCC 667 the efficacy of *Kasturi Lal* case as a binding precedent has been eroded. Hence, the Supreme Court upheld the award against the Railways of a compensation of Rs. ten lakhs by the High Court to a foreign passenger, victim of gang-rape committed by the railway employees in a room of a Railway Yatri Niwas booked in their name.[9]

Likewise the persons employed in government hospitals cannot claim sovereign immunity and the government will be liable for their tortious acts.[10]

(B) On the other hand, a suit lies against the Government for wrongs done by public servants in the course of transactions which a trading company or a private person could engage in such as the following:

(i) Injury due to the negligence of servants of the Government employed in a dockyard or a railway; (ii) trespass upon or damage done to private property in the course of a dispute as to right to land between Government and the private owner, even though committed in the course of a colourable exercise of statutory powers; (iii) the State is liable to be sued for *restitution of* the profits unlawfully made, just as a private owner, *e.g.*, where Government retains property or moneys unlawfully seized by its officers, a suit lies against the Government for its recovery, with interest; (iv) defamation contained in a resolution issued by Government; (v) injury caused by a Government vehicle while such vehicle was not being engaged in carrying out any sovereign function,[6] or engaged in famine relief work.[11]

Suability of Heads of State.

Though the State itself is immune from liability in certain cases already noted owing to historical reasons, *our* Constitution does not grant any immunity to a public servant for his official acts which are unlawful under the ordinary law of the land. The only exception to this rule is a limited immunity granted to the heads of State, namely, the President and a Governor,[12] both for their political and personal acts, while in office [*Art.* 361].

Immunity of President or Governor for official acts.

I. *Official Acts.* The immunity given for official acts of the President or the Governor is absolute but it is limited only to the President and the Governor personally, and no other person can shield himself from legal liability on the plea that it was done under orders or the President or a Governor.[12]

The President or a Governor is immune from legal action and cannot be sued in a Court, whether during office or thereafter, for any act done or purported to be done by them or for any contract made [*Art.* 299(2)] in exercise of their powers and duties as laid down by the Constitution or by any law made thereunder [*Art.* 361(1)]. Though the President is liable to be impeached under Art. 61 and the Governors may be dismissed by the President,—for any unconstitutional act done in exercise of their official powers, no action lies in the Courts.

It follows from the rule of personal immunity that no Court can compel the President or the Governor to exercise any power or to perform any duty nor can a Court compel him to forbear exercising his power or performing his duties. He is not amenable to the writs or directions issued by any Court.

The remedy to an individual for wrongful official acts of the President or a Governor is twofold—

(i) To bring appropriate proceedings against the respective Government itself, where such proceedings lie [*Art.* 361(1), *Prov.* 2].

(ii) To bring an action against the public servant, individually, who has executed the wrongful order of the President or Governor, and must, therefore, answer to the aggrieved individual, under the ordinary law of crimes or civil wrongs, subject to limitations, to be explained shortly.

Position of Ministers.

In this connection, it should be noted that while the Constitution grants personal immunity to the President or a Governor for official acts, no such immunity is granted to their Ministers.[12] But by virtue of the peculiar position of Ministers as regards official acts of the President or the Governor, as the case may be, it is not possible to make a Minister liable in a court of law, for any official act done in the name of the President or Governor. As pointed out earlier, the position in this respect in India differs from that in the United Kingdom. In *England,* every official act of the Crown must be countersigned by a Minister who is responsible to the law and the Courts for that act. But though the principle of ministerial responsibility has been adopted in our Constitution, both at the Centre and in the States, the principle of legal responsibility has not been introduced in the English sense. There is no requirement that the acts of the President or of the Governor must be countersigned by a Minister. Further, the Courts are precluded from enquiring as to what advice was tendered by the Ministers to the President or the Governor. It is clear, therefore, that the Ministers shall not be liable for official acts done on their advice. But there is no immunity for offences committed in their personal capacity.[12]

Personal acts during Term of Office.

II. *Personal Acts.* The immunity of the President or a Governor for unlawful personal acts committed by him during the term of his office is limited to the duration of such term.

(a) As regards crimes, no proceedings can be brought against them or continued while they are in office: but there is nothing to prevent such proceedings after their office is terminated[13] by expiry of term, dismissal or otherwise.

(b) As regards civil proceedings, there is no such immunity, but the Constitution imposes a procedural condition:

Civil proceedings may be brought against the President or a Governor, in respect of their *personal* acts, but only if two months' notice in writing has been delivered to the President or Governor.

Suability of Public Officials.

As stated before, the Constitution makes no distinction in favour of Government servants as to their personal liability for any unlawful act done by them whether in their official or personal capacity. There is only one provision in the Constitution relating to the liability of public servants; but the general law imposes certain conditions as regards their liability for official acts, in view of their peculiar position. These may be analysed as follows:

(i) *Contract.* If a contract made by a Government servant in his official capacity complies with the formalities laid down in Art. 299, it is the Government concerned which will be liable in respect of the contract and not the officer who executed the contract [*Art.* 299(2)].

If, however, the contract is not made in term of Art. 299(2), the officer who executed it would be *personally* liable under it, even though he may not have derived any personal benefit.

(ii) *Torts.* As stated earlier, in India, the Government is not liable to answer in damages for its 'sovereign' acts. In such cases, the officer through whom such act is done is also immune.

In other cases, action will lie against the Government as well as the officer personally, unless—

(a) the act has been done, *bona fide,* in the performance of duties imposed by a statute;

(b) he is a judicial officer, within the meaning of the Judicial Officers' Protection Act, 1850. This Act gives absolute immunity from a civil proceeding to a judicial officer for acts done in the discharge of his official duty.[13]

But any civil action, whether in contract or in torts, against a public officer "in respect of any act *purported* to be done by such public officer in his official capacity", is subject to the procedural limitations in ss. 80-82 of the Code of Civil Procedure which include a two months' notice as a condition precedent to a suit.[4]

(iii) *Crimes.* The criminal liability of a public servant is the same as that of an ordinary citizen except that—

(a) There is no liability for judicial acts or for acts done in pursuance of judicial orders [*ss.* 77-78, *Indian Penal Code*].[13]

(b) Officers, other than judicial, are also immune for any act which they, by reason of some mistake of law or fact, in good faith, believed themselves to be bound by law to do [*s.* 76, I.P.C.].[13]

(c) Where a public servant who is not removable from his office save by or with the sanction of the Central or State Government is accused of an offence, committed by him while acting or purporting to act in the discharge of his official duty, no Court can take cognizance of such offence without the previous sanction of the Central Government or the State Government, as the case may be [*s.* 197, Criminal Procedure Code].[14]

(iv) For acts done for the maintenance or restoration of order in an area where martial law was in force, Parliament may exempt the officers concerned from liability by validating such acts by making an Act of Indemnity [*Art.* 34].

REFERENCES

1. *Sheo Nand* v. *Deputy Director of Consolidation,* (2000) 3 S.C.C. 103 : A.I.R. 2000 S.C. 1141.
2. *Delhi Science Forum* v. *Union of India,* (1996) 2 S.C.C. 405 : A.I.R. 1996 S.C. 1356.
3. *Narayanappa* v. *State of Mysore,* AIR 1960 S.C. 1073 (*1078*); *Parbhani Transport Society* v. *R.T.A.,* AIR 1960 S.C. 801.
4. *Daruka* v. *Union of India,* AIR 1973 S.C. 2711; *Excel Wear* v. *Union of India,* AIR 1979 S.C. 25 (para 24).
5. *Bhikraj* v. *Union of India,* AIR 1962 S.C. 118; *Chaudhury* v. *State of M.P.,* AIR 1967 S.C. 203; *State of U.P.* v. *Murari,* (1971) 2 S.C.C. 449.
6. *State of Rajasthan* v. *Vidyawati,* AIR 1962 S.C. 933 (*935*); *Kasturi Lal* v. *State of U.P.,* AIR 1965 S.C. 1039.
7. *Rudul* v. *State of Bihar,* (1983) 4 S.C.C. 141; *Saheli* v. *Commissioner of Police,* (1990) 1 S.C.C. 422 was also a case in which the State was ordered to pay compensation.
8. *Nagendra Rao* v. *State of A.P.,* (1994) 6 S.C.C. 205. In this case the State confiscated certain goods. When the Court annulled the confiscation, the State could not return the goods because they had deteriorated. The Court held that the owner was entitled to compensation.
9. *Chairman, Railway Board* v. *Chandrima Das,* (2000) 2 S.C.C. 465 : A.I.R. 2000 S.C. 989.
10. *Achutrao Haribhan Khodwa* v. *State of Maharashtra,* (1996) 2 S.C.C. 634 : A.I.R. 1996 S.C. 2377.
11. *Shyam Sunder* v. *State of Rajasthan,* AIR 1974 S.C. 890 (para 21).
12. The Constitution (41st Amendment) Bill, 1975 sought to amend Art. 361, to bar criminal proceedings against the President, Governor *or Prime Minister* even after termination of their office. But this Bill could *not* be passed in the *Lok Sabha* before Mrs. Gandhi lost office in 1977. In the result, the Prime Minister has *no* immunity at all, for his or her personal acts.
13. Author's *Commentary on the Constitution of India,* 5th Ed., Vol. V, p. 453.
14. Author's *Criminal Procedure Code, 1973* (Prentice-Hall of India, p. 520).

CHAPTER 30

THE SERVICES AND PUBLIC SERVICE COMMISSIONS

ONE of the matters which do not usually find place in a constitutional document but have been included in *our* Constitution is the Public Services.

Position of Civil Servants in a Parliamentary System of Government.

The wisdom of the makers of *our* Constitution in giving a constitutional basis to such matters as are left to ordinary legislation and administrative regulations under other Constitutions may be appreciated if we properly assess the importance of public servants in a modern democratic government.

A notable feature of the Parliamentary system of government is that while the policy of the administration is determined and laid down by ministers responsible to the Legislature, the policy is carried out and the administration of the country is actually run by a large body of officials who have no concern with politics. In the language of Political Science, the officials form the 'permanent' Executives as distinguished from the Ministers who constitute the 'political' Executive. While the political Executive is chosen from the party in majority in the Legislature and loses office as soon as that party loses its majority, the permanent Executive is appointed by a different procedure and does not necessarily belong to the party in power. It maintains the continuity of the administration and of the neutrality in politics that characterises the civil servants who constitute the permanent Executive and accounts for their efficiency. While the Ministers, generally, cannot claim any expert knowledge about the technique of administration and the details of the administrative departments, the civil servants, as a body, are supposed to be experts in the detailed working of government. One inherent vice in this system of carrying on the administration with the help of these 'permanent' civil servants is that they tend to be more and more tied to red-tape and routine and lack that responsiveness to fresh ideas which the political Executive is sure to maintain owing to their responsibility to the Legislature. But with all this inherent vice, the civil servants are *indispensable* to the Parliamentary form of Government.

As the Joint Select Committee on Indian Constitutional Reforms[1] observed—

> "The system of responsible Government, to be successful in practical working, requires the existence of a competent and independent Civil Service staffed by persons capable of giving to successive Ministers advice based on long administrative experience, secure in their positions, during good behaviour, but

required to carry out the policy upon which the Government and Legislature eventually decide."

The reason is that in the modern age, government is not only an art but also a science and, to that extent a business for experts. It has, therefore, naturally fallen into the hands of a very large army of people who have taken up the business of government, being in service of the Government, itself,—as their professional career. Since they cannot be dispensed with, the problem of a modern democracy is how to prevent them from converting the democratic system into a 'bureaucracy' or officialdom. The remedy lies not in the assumption of the work of government by the Legislature, for a direct democracy as prevailed in the ancient State is an impossibility under modern conditions. Nor does remedy lie in the assumption of the actual work of administration, as distinguished from the laying down of policies, by the Ministers or the political heads of the Departments, for, as has been already stated, the task is not only technical but enormous, and the Ministers might lose sight of the broader and serious questions of national urgency if they were to enter into the details of the day-to-day administration.

Matters which call for regulation.

The proper solution of the problem, therefore is—firstly, to select the right type of men who shall be not only efficient but also honest and who can be trusted with confidence that they would not abuse their position and would be strictly impartial, having no personal or political bias of their own and would be ready to faithfully carry out the policy once it is formulated by the government for the time being in power; secondly, to keep them under proper discipline so that they maintain the proper relationship with their employer, *viz.*, the State; and thirdly, to ensure that for breaches of the rules of discipline, they can be brought under proper departmental action and, for breach of law, made answerable before the Courts of law. Once the interests of the State are thus secured, it is equally essential that the security of tenure of public servants who do not contravene the foregoing principles should be ensured. For, the best available talents would never be attracted unless there is a reasonable security against arbitrary action by superior officials who exercise the governmental power as to removal and discipline.

All the aforesaid objects can be achieved only if there are definite rules and proper safeguards in respect of what is broadly known as the 'conditions of service' of public servants and *our* Constitution seeks to lay down some basic principles in this behalf.

Power to prescribe conditions of Service.

It is not that *our* Constitution seeks to make detailed provisions relating to every matter concerning the Public Service. The makers of the Constitution realised that that was not practicable and therefore left the recruitment and conditions of service of the public servants of the Union and of the State to be regulated by Acts of the appropriate Legislatures. Pending such legislation, however, these matters were to be regulated by Rules made by the President or by the Governor in connection with the services under the Union and the States respectively [*Art.* 309]. Once the legislature intervenes to enact a law, the power of the executive (the President/the Governor) is totally displaced and the Act of the legislature would have precedence over any rule made by the executive under Art. 309[2] but no rule can be framed which affects or impairs the vested rights.[3] However, these rules have equal force of law.[4] Though already some Acts have been passed, for instance, the All-India Services Act, 1951, the larger part of the field is still covered by Rules made by the Government, not only under the Constitution, but also those existing from before (that is, made under the Government of India Acts), which are to continue to be in force until superseded by the appropriate authority. It is to be noted, however, that neither a Rule nor any Act of the Legislature made in this behalf can have any validity if its provisions are contrary to those of the Constitution. As a matter of fact, our courts have already annulled a number of Service Rules on the ground of contravention of some of the constitutional provisions. For instance, if any rule or order enables the Government to dismiss a Government servant without giving him an opportunity to be heard, such rule would be struck down as unconstitutional owing to contravention of the requirement in Art. 311(2).[5]

The two matters which are substantively dealt with by our Constitution are—

(a) Tenure of office of the public servants and disciplinary action against them;

(b) The constitution and functions of the Public Service Commissions, which are independent bodies to advise the Government on some of the vital matters relating to Services.

Tenure of office.

Service at Pleasure.

We have inherited from the British system the maxim that all service is at the pleasure of the Crown, and *our* Constitution, therefore, primarily declares that anybody who holds a post (civil or military) under the Union or a State holds his office during the pleasure of the President or the Governor, as the case may be [*Art.* 310(1)]. The power to compulsory retire a government servant is one of the facets of the doctrine of pleasure incorporated in this Article.[6]

This means that any Government employee may be dismissed at *any* time and on *any* ground, without giving rise to any cause of action for wrongful dismissal, except where the dismissal is in contravention of the constitutional safeguards to be mentioned just now.

Cannot be fettered by Contract.

This right of the Government to dismiss a Government servant at its pleasure cannot be fettered by any contract and any contract made to this effect would be void, for contravention of Art. 310(1) of the Constitution which embodies the principle of service at pleasure. This rule is, however, subject to one exception specified in Art. 310(2) namely, that where Government is obliged to secure the services of technical personnel or specialists, not belonging to the regular Services, by entering into a special contract, without which such persons would not be available for employment under the Government. In such cases, compensation would be payable for premature termination of the service if the contract provides for such payment. But even in such cases, no compensation would be payable under the clause if the service is terminated within the contractual period, on the ground of his *misconduct*. It will be payable only—

(a) if the post is abolished before the expiration of the contractual period; or,

(b) if the person is required to vacate his post before the expiry of the contractual period, for reasons *unconnected with misconduct*.

Limitations upon exercise of the Pleasure.

While, however, the pleasure of the Crown in England is absolutely unfettered, the Constitution of India subjects the above pleasure to certain exceptions and limitations:

Exceptions in the case of some high officials.

A. In the case of certain high officials, the Constitution lays down specific procedures as to how their service may be terminated. Thus, as has been noted in their proper places earlier, the Supreme Court Judges, the Auditor-General, the High Court Judges and the Chief Election Commissioner shall not be removed from their offices except in the manner laid down in Arts. 124, 148, 218, 324, respectively. These offices thus constitute exceptions to the general rule of tenure 'during pleasure' of Government servants.

Safeguards for civil servants.

B. Though all other Government servants hold office during the pleasure of the President or the Governor (as the case may be), two procedural safeguards are provided for the security of tenure of '*civil*' servants as *distinguished from military personnel*, namely, that—

(a) A civil servant shall not be dismissed or removed by any authority subordinate to that by which he was appointed. In other words, if he is to be removed from service, he is entitled to the consideration of his appointing authority or any other officer of corresponding rank before he is so removed. The object of this provision [*Art.* 311(1)] is to save a public servant from the caprices of officers of inferior rank.

(b) The other security which is guaranteed by the Constitution is that no dismissal, removal or reduction in rank shall be ordered against a civil servant unless he has been given a reasonable opportunity of being heard in respect of the charges brought against him.

A. Prior to 1976, this opportunity had to be given at two stages—(a) at the stage of inquiry into the charges; and (b) to make representation against the penalty (such as dismissal, removal, reduction in rank, censure) proposed to be imposed, after the inquiry had been concluded, holding the employee guilty of the charges.

B. But the Constitution (42nd Amendment) Act, 1976, has omitted the right of the employee to make a representation against the penalty proposed, retaining, however, the safeguard that the penalty can be proposed only on the basis of the evidence adduced at the inquiry stage. The result is that the judicial decisions[7] prior to 1976, which required that the 'opportunity' under Art. 311(2) must be offered at two stages, have been superseded by the 42nd Amendment.

Hence, after this amendment of 1976, the expression 'reasonable opportunity' must be interpreted to imply that the Government or other authority proceeding against a civil servant must give him—

(i) an opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(ii) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence.

Hence, the authority must (i) frame specific charges with full particularity, (ii) intimate those charges to the Government servant concerned, (iii) give him an opportunity to answer those charges; (iv) after considering his answers, take its decision; and (v) the rules of natural justice should be observed in coming to the finding against the accused.

But no 'inquiry' need be held where the employee is given sufficient opportunity to explain his conduct but he does not wilfully avail himself of that opportunity[8] as was done in the case of dismissal of an absconder who failed to respond to show cause why his services be not terminated by way of dismissal as his further retention in service was not desirable.[9] This would not, however, apply where he fails to attend the inquiry owing to default of the Government in allowing him subsistence allowance.[10]

(iii) when the inquiry officer is not the disciplinary authority the delinquent employee has a right to receive a copy of the inquiry officers report before the disciplinary authority arrives at its conclusions. It is a part of the right to defence.[11]

In which cases the opportunity must be given.

The inquiry must be held and the opportunity to be heard must be given if two conditions are satisfied:

(i) The employee is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State.

(ii) Such employee is sought to be dismissed, removed or 'reduced in rank'.

While a person "dismissed" is ineligible for re-employment under the Government, no such disqualification attaches to a person 'removed'.[12] But two elements are common to 'dismissal' and 'removal':

(a) Both the *penalties* are awarded on the ground that the conduct of the Government servant is blameworthy or deficient in some respect.

(b) Both entail penal consequences, such as the forfeiture of the right to salary, allowances or pension already acquired, for past services.

What constitutes Dismissal, Removal and Reduction in Rank.

Where no such penal consequence is involved, it would not constitute 'dismissal' or 'removal', *e.g.*, where a Government servant is 'compulsorily retired',[5, 13] without any further penal consequence attached to such order.[14]

As would appear from the decisions of the Supreme Court,[15] the term actually used in the order terminating the officer's services is not conclusive. Words such as 'discharged' or 'retrenched' may constitute 'dismissal' or 'removal', if the order entails *penal consequences,* as referred to above. Termination of the services of a temporary employee during the pendency of his criminal trial, for the same assault, was held to be punitive amounting to dismissal.[16]

It is also clear that in order to attract Art. 311(2), the termination of services must be *against the will* of the civil servant. Hence, the following orders of termination of service have been held *not* to constitute 'dismissal' or 'removal':

(a) Termination in accordance with the terms of the contract of employment.[17]

(b) Termination in terms of the conditions of service as embodied in[17-18] the relevant Department Rules applicable to the Government servant, provided such conditions are not inconsistent with the provisions of the Constitution.

(c) Fixing an age for superannuation or compulsory retirement[19], and enforcement thereof.[19]

Reduction in rank means the degradation in rank or status of the officer, directed by way of penalty. It thus involves two elements—(a) reduction in the physical sense, meaning degradation; (b) such degradation or demotion must be by way of penalty.

(a) Reduction in rank in the *physical sense* takes place where the Government servant is reduced to a lower post or to a lower pay-scale. Even reduction to a lower stage in the pay-scale (ordered by way of penalty) would involve a reduction in rank, for the officer loses his rank or seniority in the gradation list of his substantive rank.

(b) As regards the *penal nature* of the reduction, the Supreme Court has applied the test of 'right to the rank' in question, in the same manner as the 'right to the post' test has been applied in the case of dismissal or removal. Reduction in rank takes place only when a person is reduced from his substantive rank. Hence,

(i) Where a Government servant has a *right* to a particular rank, the very reduction from that rank will be deemed to be by way of penalty and Art. 311(2) will be attracted, without more. Thus,

An officer who holds a permanent post in a substantive capacity, cannot be transferred to a lower post, without complying with Art. 311(2).

(ii) On the other hand, where a Government servant has no title to a particular rank, under the contract of his employment or conditions of service,—there will ordinarily be no reduction in rank within the meaning of Art. 311 (2),[20] *e.g.*, where a person, who had been promoted to a higher post on an officiating basis[21] or contrary to the statutory recruitment rules[22], is reverted to his substantive post as it is neither punitive nor illegal. But even in this case, the order of reversion will amount to 'reduction in rank' so as to attract Art. 311(2), if the reversion entails penal consequences, such as postponement of future chances of promotion or the order contains a stigma which indicates that it was penal in nature;[20] though, in the absence of such penal features, the motive of the authority would be irrelevant.[23] Reversion of the employees from their confirmed posts by imposing additional qualifications and functions to their confirmed post would offend Art. 311.[24]

Exceptions to the requirement of giving opportunity.

It is to be noted that even where a person holding a civil post is dismissed, removed or reduced in rank, no inquiry need be held and no opportunity need be given in three classes of cases, which themselves explain the reasons for the exceptions—

(a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; but such a charge must relate to a misconduct of such magnitude as would have deserved the penalty of dismissal, removal or reduction in rank[25]

(b) Where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry the Supreme Court upheld the concurrent view taken by the disciplinary authority and the appellate authority that holding inquiry into the case of a Head Constable who was working for terrorists and preparing to murder some senior police officers, was not practicable.[26]; or

(c) Where the President or Governor, as the case may be, is satisfied that in the interest of the *security of the State* it is not expedient to hold such inquiry [2nd Proviso to *Art.* 311 (2)].[27] In cases where the mere disclosure of the charge might affect the security of the State, the President or the Governor might exempt the holding of an inquiry[28] but such satisfaction should not be *mala fide.*[29] However, the satisfaction need not be personal as such power is exercised in compliance with Art. 166[30] but the Govt. is required to disclose the nature of activities of the employee which formed the basis of such satisfaction so that the court/tribunal may be able to determine whether there was any reasonable nexus between such activities and the security of the State or not[31] without which the dismissal might be held to be *ultra vires.*[32]

Article 323A of the Constitution and the Administrative Tribunals Act, 1985.

A radical change has taken place in the constitutional law relating to Services by the 42nd Constitution Amendment Act, 1976, which inserted into the Constitution Art. 323A, to take out the adjudication of disputes relating to the recruitment and conditions of service of the public services of the Union and of the States from the hands of the Civil Courts and the High Courts and to place it before an Administrative Tribunal for the Union or of a State (as the case may be).

This provision of the Constitution was to come into effect only if it was implemented by a law made by Parliament. That law has been enacted by Parliament in 1985 and brought into force on October 2, 1985, by setting up a Central Administrative Tribunal (with branches in the specified cities).

According to this Administrative Tribunal Act, 1985 (as amended in 1986), the Central Administrative Tribunal will adjudicate disputes and complaints with respect to the 'recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union', excepting—

(a) Members of the Defence Forces.

(b) Officers and servants of the Supreme Court or of any High Court.

(c) Members of the secretarial staff of Parliament, or of any Legislature of any State or Union Territory.

Excluding the above categories, any public servant of the Union who is aggrieved, in the matter of his appointment, removal or reduction in rank or the like, shall have to be contented with administrative justice by a Tribunal instead of by a Court of law. The only Court to which the aggrieved person might run, as a last resort, is the Supreme Court, under Arts. 32 and 136.

The decisions of the Administrative Tribunal can, therefore, be challenged only before the Supreme Court and the High Court shall not be competent to interfere under Art. 226 or 227. But subsequently, the position turned out to be otherwise as the Supreme Court declared the Articles 323-A, Cl. 2(d) and 323-B, Cl. 3(d) and also the "exclusion of jurisdiction" clauses in all the legislations enacted in pursuance of these Articles, unconstitutional to the extent they excluded the jurisdiction of the High Courts and the Supreme Court under Arts. 226/227 and 32.[33]

Public Service Commissions for the Union and the States.

There shall be a Public Service Commission for the Union; and a Public Service Commission for each State or a Joint Public Service Commission for a group of States if the Parliament provides for the establishment of such a Joint Public Service Commission in pursuance of a resolution to that effect being passed by the State Legislatures concerned. The Union Public Service Commission also may, with the approval of the President, agree to serve the needs of a State, if so requested by the Governor of that State [*Art.* 315].

The number[34] of members of the Commission and their conditions of service shall be determined (a) by the President in the case of the Union or a Joint Commission, and (b) by the Governor of the State in the case of a State Commission; provided that the conditions of service of a member of a Commission shall not be altered to his disadvantage after his appointment.

Appointment and Term of office of Members.

The *appointment* of the Chairman and members of the Commission shall be made—(a) in the case of the Union or a Joint Commission, by the President; and (b) in the case of a State Commission, by the Governor of the State. Half of the members of a Commission shall be persons who have held office under the Government of India or of a State for at least ten years [*Art.* 316].

The *term of service* of a member of a Commission shall be six years from the date of his entering upon office, or until he attains the age of sixty five years in the case of the Union Commission or of sixty two years[35] in the case of a State or a Joint Commission. But a member's office may be terminated earlier, in any of the following ways:

(i) By *resignation* in writing addressed to—the President in the case of the Union or a Joint Commission, or the Governor in the case of a State Commission.

(ii) By *removal* by the President—(a) if the member is adjudged insolvent; or engages himself during his term in paid employment outside the duties of his office; or is in the opinion of the President infirm in mind or body; (b) on the ground of misbehaviour according to the report of the Supreme Court which shall hold an enquiry on this matter on a reference being made by the President.

Thus, even in the case of a State Commission, it is only the President who can make a reference to the Supreme Court and make an order of removal in pursuance of the report of the Supreme Court. The Governor has only the power to pass an interim order of suspension pending the final order of the President on receipt of the report of the Supreme Court [*Art.* 317(1)—(2)].

If a member's term comes to an end while a reference under Art. 317(1) is pending in the Supreme Court the reference[36] does not become infructuous and the court must answer it.

A member shall be deemed to be guilty of misbehaviour—(i) if he is in any way concerned or interested in any contract made on behalf of the Government of India or of a State; or (ii) if he participates in any way in the profit of such contract or agreement or in any benefit therefrom otherwise than as a member and in common with other members of an incorporated company [*Art.* 317(4)].

The Constitution seeks to maintain the independence of the Public Service Commission from the Executive in several ways—

Independence of the Commission.

(a) The Chairman or a member of a Commission can be removed from office only in the manner and on the grounds specified in the Constitution (see *above*).

(b) The conditions of service of a member of the Public Service Commission shall not be varied to his disadvantage after his appointment [Proviso to *Art.* 318].

(c) The expenses of the Commission are charged on the Consolidated Fund of India or of the State (as the case may be) [*Art.* 322].

(d) Certain disabilities are imposed upon the Chairman and members of the Commission with respect to future employment under the Government [*Art.* 319]. Thus, on ceasing to hold office—

Prohibition as to the holding of offices by Members of Commission on ceasing to be such Members.

(a) The Chairman of the Union Public Service Commission shall be ineligible for further employment either under the Government of India or under the Government of a State;

(b) the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of any other

State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State;

(c) a member other than the Chairman of the Union Public Service Commission shall be eligible for appointment as the Chairman of the Union Public Service Commission or as the Chairman of a State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State;

(d) a member other than the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of that or any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State.

In short, the bar against employment under the Government is *absolute* in the case of the Chairman of the Union Public Service Commission; while in the case of the Chairman of a State Public Service Commission or of the other members of the Union or State Commissions, there is scope of employment in a higher post within the Public Service Commission but not outside.

The Public Service Commissions are *advisory bodies*.[37] It is open to the government to accept the recommendation or depart from it.[38]

The following are the duties of the Union and the State Public Service Commissions—

Functions of Public Service Commissions.

(a) To conduct examination for appointments to the services of the Union and the services of the State respectively.

(b) To advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor of a State may refer to the appropriate Commission [*Art.* 320].

(c) To exercise such additional functions as may be provided for by an act of Parliament or of the Legislature of a State—as respects the services of the Union or the State and also as respects the services of any local authority or other body corporate constituted by law or of any public institution [*Art.* 321].

(d) To present annually to the President or the Governor a report as to the work done by the Union or the State Commission, as the case may be [*Art.* 323].

(e) It shall be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required [*Art.* 320(2)].

(f) The Public Service Commission for the Union, if requested so to do by the Governor of a State, *may*, with the approval of the President, *agree* to serve all or any of the needs of the State.

The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted—

(a) on all matters relating to methods of recruitment to civil services and for civil posts;

(b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

(c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;

(d) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;

(e) on any *claim* for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award [*Art.* 320(3)].

But—

(i) The President or the Governor, as the case may be, as respects the services and posts in connection with the affairs of the Union or of a State, may specify the matters in which either generally, or in any particular class of cases, or in any particular circumstances, it shall *not be necessary for* a Public Service Commission to be consulted. But all such regulations must be laid before the appropriate Legislature and be subject to such modifications as may be made by the Legislature.

(ii) It has been held by the Supreme Court[39] that the obligation of the Government to consult the Public Service Commission in any of the matters specified above does *not* confer any *right* upon any individual who may be affected by any act of the Government done without consulting the appropriate Commission as required by the Constitution. The reason assigned by the Court is that the consultation prescribed by the Constitution is to afford proper assistance to the Government, in the matter of assessing the guilt of a delinquent officer, the merits of a claim for reimbursement of legal expenses and the like; and that the function of the Commission being purely advisory,[37] if the Government fails to consult the Commission with respect to any of the specified matters, the resulting act of the Government is not invalidated by reason of such omission and no individual who is affected by such act can seek redress in a Court of law against the Government for such irregularity or omission.[39]

Report of Public Service Commissions.

As stated already, it shall be the duty of the Union Commission to present annually to the President a report as to the work done by the Commission and on receipt of such report the President shall cause a copy thereof together with a memorandum explaining, as respect the cases, if any, where the advice of the Commission was not accepted, the reason for such non-acceptance, to be laid before each House of Parliament [*Art.* 323(1)]. A State Public Service Commission has a similar duty to submit an annual report to the Governor and the latter has a duty to lay a copy of such report before the State Legislature with a memorandum explaining the cases, if any, where the advice of the Commission was not accepted by the Government [*Art.* 323(2)].

How far Commission's advice binding on the Government.

As stated earlier, the function of the Public Service Commission is only advisory and the Constitution has no provision to make it obligatory upon the Government to act upon the advice of the Commission in any case.[37] The reason is that, under the Parliamentary system of government, it is the Cabinet which is responsible for the proper administration of the country and its responsibility is to Parliament. They cannot, therefore, abjure this ultimate responsibility by binding themselves by the opinion of any other body of persons. On the other hand, in matters relating to the recruitment to the Services and the like, it would be profitable for the Ministers to take the advice of a body of experts. It is in this light that Sir Samuel Hoare[40] justified the parallel provisions as to the Public Service Commissions in the Government of India Act, 1935—

> "Experience goes to show that they are likely to have more influence if they are advisory than if they have mandatory powers. The danger is that if you give them mandatory powers you then set up two governments."

But, though the Simon Commission[41] was conscious of the fact that left alone, the Ministers might use their position "to promote family or communal interests at the expense of the efficiency or just administration of the services", no safeguard was prescribed in the Government of India Act, 1935 against a flagrant disregard of the recommendations of the Commissions by the Government. In view of the possibility of such abuse, the Constitution has provided the safeguard (referred to above) of the Commission's Report being laid before Parliament (or State Legislature), through the President (or the Governor) as the case may be. The Government is under an obligation, while presenting such Report, to explain the reasons why in any particular case the recommendation of the Commission has been overridden by the Government. In view of this obligation to submit to Parliament an explanation for non-acceptance of the advice of the Commission, the number of such cases may be said to have been kept at a minimum.

Notwithstanding the above safeguard, there is criticism from certain quarters that patronage is still exercised by the Government by resorting to some devices—

(a) One of these is the system of making *ad hoc* appointments for a temporary period without consulting the Public Service Commission and then approaching the Commission to approve of the appointment at a time when the person appointed has already been in service for some time and the recommendations of his superiors are available to him, in addition to the experience already gained by him in the work, which puts him at an advantage over the new candidates. The Supreme Court has been deprecating this practice of making *ad hoc* appointments. The Supreme Court did not allow the services of the employees appointed *de hors* the rules, although officiating for a long period of 14 years;[42] that of the *ad hoc* appointees by bypassing the process of recruitment through open competition[43] and a temporary appointee on monthly basis during the period of strike,[44] to be regularised.

(b) Sometimes the rules laying down the qualifications for the office to which such appointment has been made is changed retrospectively to fit in the appointee.

(c) Another complaint is that sometimes the Reports are presented before Parliament (or State Legislature as the case may be) long after the year under review. This, however, does not appear to be permissible under the Constitution. So far as the duty of the Commission to report to the President or the Governor is concerned, the Constitution says that it must be done 'annually'. Hence, his obligation cannot be postponed for more than a few months from the end of the period under Report. The duty of the President or the Governor is to present the Report to Parliament or the State Legislature "on receipt of such Report". Though no specific time-limit is imposed, it is clear that it must be done as soon as possible after the receipt of the annual Report and it cannot be construed that the obligation is discharged by presenting the Report two or three years after the receipt or by presenting the Reports for two or three years in a lump. The presentation before the Legislature must also be an annual affair, and, if the President or the Governor makes delay, it should be the concern of the appropriate Legislature to demand an explanation for such delayed presentation, apart from anything else. If the Legislature slumbers, the entire machinery of Parliamentary government will succumb, not to speak of any particular object of scrutiny by the Legislature.

All-India Services.

Another matter relating to the Services which is dealt with by the Constitution is the creation of All-India Services. The All-India Services should be distinguished from Central Services. The 'Central Services' is an expression which refers to certain Services under the Union, maintained on an all-India basis, for service throughout the country—for instance, the Indian Foreign Service, the Indian Audit and Accounts Service, the Indian Customs and Excise Service and the like. The expression "All-India Service", on the other hand, is a technical one, used by the Constitution to indicate only the Indian Administrative Service and the Indian Police Service and such other Services[45] which may be included in this category in the manner provided by Art. 312 of the Constitution. That Article provides that if the Council of States declares by a resolution, supported by not less than two-third of the members present and voting, that it is necessary and expedient in the national interest to create an All-India Service, common to the Union and the States, Parliament may provide for its creation by making a law. The practical incident of an All-

India Service thus is that the recruitment to it and the conditions of service under it can be regulated only by an Act of the Parliament. It must be noted that it is by virtue of this power that Parliament has made the All-India Services Act, 1951 and that the conditions of service, recruitment, conduct, discipline and appeal of the members of the All-India Services are now regulated by Rules made under this Act. Since these Rules provide that the officers of the All-India Services shall be appointed and controlled by the Union Government, these Services constitute an additional agency of control of the Union over the State, insofar as members of these Services are posted in key posts in the States.

Fundamental Rights of Civil Servants.

I. Subject to the power of Parliament, under Art. 33, to modify the fundamental rights in their application to members of the Armed Forces and the Police Forces, the fundamental rights guaranteed by the Constitution are in favour of all 'citizens', which obviously include public servants.[46]

II. It follows, therefore, that a civil employee of the Government is entitled to the protection of a fundamental right such as Arts. 14,[47] 15,[48] 16,[49] 19,[46] 20 in the same manner as a private citizen. Thus—

If two sets of rules relating to disciplinary proceedings were in operation at the time when the inquiry was directed against a Government servant, and the inquiry was directed under the set of Rules which was more drastic and prejudicial to the interests of such Government servant, the proceedings against him are liable to be struck off as infringing Art. 14. In other words, if against two public servants similarly circumstanced enquiries may be directed according to procedure *substantially different*,[47] at the discretion of the Executive authority, exercise whereof is not governed by any principles having any rational relation to the purpose to be achieved by the inquiry, the order selecting a prejudicial procedure, out of the two open for selection, is hit by Art. 14.[47]

III. Restrictions upon the rights of the public servants under Art. 19 can, therefore, be imposed only on the grounds specified in Cls. (2)-(6), and to the extent that the restriction is reasonable.[46]

But while a public servant possesses the fundamental rights as a citizen, the State also possesses, under the Proviso to Art. 309, the power to regulate their 'conditions of service'. Now, the interests of service under the State require efficiency, honesty, impartiality and discipline and like qualities on the part of the public servant. The State has thus the constitutional power to ensure that every public servant possesses these qualities and to prevent any person who lacks these qualities from being in the public service. It seems, therefore, that State regulation of the conditions of service of public servants so as to restrict their fundamental rights will be valid only to the extent that such restriction is reasonably necessary in the interests of efficiency, integrity, impartiality, discipline, responsibility and the like which have a 'direct, proximate and rational' relation to the conditions of public service as well as the general grounds (*e.g.*, public order, under Art. 19) upon which the fundamental rights of all citizens may be restricted.[46]

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20. *Shitla* v. *N.E.F. Ry.*, AIR 1966 S.C. 1197; *State of Mysore* v. *Gadgoli*, AIR 1977 S.C. 1617.
21. *State of U.P.* v. *Sughar*, AIR 1974 S.C. 423; *Union of India* v. *Gajendra*, AIR 1972 S.C. 1329; *Debesh Chandra* v. *Union of India*, AIR 1970 S.C. 77.
22. *Kishore Chandra Panigrahi* v. *State of Orissa,* (1996) 11 S.C.C. 234.
23. *State of Bihar* v. *Shiva*, AIR 1971 S.C. 1011.
24. *Chandraprakash Madhavrao Dadwa* v. *Union of India,* (1998) 8 S.C.C. 154.
25. *Union of India* v. *Tulsiram,* A.I.R. 1985 S.C. 1416.
26. *Kuldeep Singh* v. *State of Punjab,* (1996) 10 S.C.C. 659 : A.I.R. 1997 S.C. 79.
27. *Union of India* v. *Tulsiram*, AIR 1985 S.C. 1416 (para 70).
28. *B.C. Dass* v. *State of Assam,* (1971) 2 S.C.C. 168.
29. *Union of India* v. *Tulsiram,* A.I.R. 1985 S.C. 1416.
30. *Shamsher Singh* v. *State of Punjab,* A.I.R. 1974 S.C. 2192.
31. *A.K. Kaul* v. *Union of India,* (1995) 4 S.C.C. 73 : A.I.R. 1995 S.C. 1403.
32. *State of Orissa* v. *Dinabandhu Beheta,* (1997) 10 S.C.C. 383.
33. *L. Chandra Kumar* v. *Union of India,* (1997) 3 S.C.C. 261 : A.I.R. 1997 S.C. 1125.
34. In 2008, the number of members of the Union Public Service Commission is 10, excluding the Chairman.
35. Raised from 60 to 62 years by the Constitution (41st Amendment) Act, 1976.
36. *In re.* ref. *under Art. 317(1)*, (1990) 4 S.C.C. 262.
37. *D'Silva* v. *Union of India*, AIR 1962 S.C. 1130.
38. *Mukherjee* v. *Union of India*, (1994) Supp. (1) S.C.C. 250.
39. *State of U.P.* v. *Srivastava*, AIR 1957 S.C. 912; *Ram Gopal* v. *State of M.P.*, AIR 1970 S.C. 158.
40. 300 Parl. Deb., c. 858.
41. Simon Commission Rep., Vol. I.
42. *E. Ramakrishnan* v. *State of Kerala,* (1996) 10 S.C.C. 565.
43. *P. Ravindran* v. *Union Territory of Pondichery,* (1997) 1 S.C.C. 350.
44. *Union of India* v. *Harish Balkrishna Mahajan,* (1997) 3 S.C.C. 194.

45. Several new Services have been added to the list of All-India Services, namely, the Indian Engineering Service, the Indian Forest Service and the Indian Medical Service [the All-India Service (Amendment) Act, 1963]; the Indian Statistical Service; Indian Economic Service.

    The Supreme Court has directed the Government of India to take steps for setting up an *All-India Judicial Service* [*All India Judges' Assocn* v. *Union of India*, AIR 1992 S.C. 165 (para 10A)]. No such Service appears to have been created by now.
46. *Kameshwar* v. *State of Bihar*, AIR 1962 S.C. 1160; *Ghosh* v. *Joseph*, AIR 1963 S.C. 812.
47. *State of Orissa* v. *Dhirendranath*, AIR 1961 S.C. 1715; *Jagannath* v. *State of U.P.*, AIR 1961 S.C. 1245.
48. *State of Punjab* v. *Joginder*, AIR 1963 S.C. 913.
49. *Devadasan* v. *Union of India*, AIR 1964 S.C. 179.

CHAPTER 31

ELECTIONS

Elections.

WHILE the Constitution lays down the procedure for the election of the President[1] [*Art.* 54] and the Vice-President[1] [*Art.* 66], the procedure for election to the Legislatures of the Union and the States is left to legislation, the Constitution itself providing certain principles. These principles are—

(a) There is no provision for communal, separate or special representation. There shall be one electoral roll for every territorial constituency for election to either House of Parliament or to the State Legislature and no person shall be excluded from such roll on grounds only of religion, race, caste, sex or any of them [*Art.* 325].

(b) The election shall be on the basis of adult suffrage, *i.e.*, every person who is a citizen of India and who is not less than 18[2] years of age shall be entitled to vote at the election provided he is not disqualified by any provision of the Constitution or of any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime, or corrupt or illegal practice [*Art.* 326].

Power of Legislature.

Subject to the above principles and the other provisions of the Constitution, the power to make laws relating to all matters in connection with the election not only to the Houses of Parliament, but also to the Houses of the Legislature of a State belongs to the Union Parliament [*Art.* 327; Entry 72, List I, 7th Sch.]. The State Legislature has, however, a subsidiary power in this respect. It can legislate on all electoral matters relating to the State Legislature insofar as such matters are not covered by legislation by Parliament. The laws of the State Legislature shall, in other words, be valid only if they are not repugnant to laws made by Parliament and, of course, to the provisions of the Constitution [*Art.* 328]. Parliament has enacted the Representation of the People Acts, 1950, 1951, as well as the Delimitation Commission Acts, 1962, 1972, to prescribe the mode of election, and the formation and delimitation of the constituencies relating to election.

Single-member Territorial Constituencies.

The procedure prescribed by these Acts is voting based on single-member territorial constituencies. While proportional representation has been prescribed for election to the office of the President and the Vice-President, that system has *not* been adopted for election to the Legislature of the Union and the States.

Disputes are bound to arise in the matter of such a big-scale election on various points, such as, whether the procedure for election was properly

Decision of disputes relating to Election of Members.

followed or whether any candidate returned as member suffered from any disqualification under the law or the Constitution, or whether a candidate who ought to have been returned has been, in fact, declared not elected. For the decision of such disputes, the Constitution provides [*Art.* 329] that the ordinary courts of the land will have no jurisdiction and that any question relating to an election can be agitated only by an election petition, as provided for by law.

Article 329 provides—

> "Notwithstanding anything in this Constitution—
>
> (b) No election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

Under the Representation of the People Act, as it stood at the end of 1996, the power to decide an election petition is vested in the High Court, with appeal to the Supreme Court.

The 42nd Amendment—setting up Election Tribunals.

By Art. 323B of the Constitution, as inserted by the Constitution (*42nd Amendment*) Act, 1976, power has been conferred on the appropriate Legislature to set up a Tribunal for the adjudication of disputes relating to elections of the Legislature concerned, by making law, and to provide in such law for the exclusion of all Courts (save that of the Supreme Court under Art. 136), to entertain any such matter. In short, when any such law is made in exercise of this power, the High Court will cease to have any jurisdiction over election disputes; they will be determined only by the Administrative Tribunal set up by law, with appeal from the decision of such Tribunal to the Supreme Court by special leave under Art. 136.

Special Jurisdiction for Election Disputes re. President, Vice-President, Prime Minister, Speaker.

In Art. 71 of the Constitution, the exclusive forum for adjudicating disputes relating to the election of the President and Vice-President is the Supreme Court. There is no special provision for the Prime Minister or the Speaker of the House of the People, so that any dispute relating to election to these offices is to be determined only by an election petition before the High Court, according to Art. 329(b).

Election Commission.

In order to supervise the entire procedure and machinery for election and for some other ancillary matters, the Constitution provides for an independent body, namely, the Election Commission [*Art.* 324]. The provisions for the removal of the Election Commissioners make them independent of executive control and ensure an election free from the control of the party in power for the time being.

The Election Commission shall consist of a Chief Election Commissioner and such other Commissioners as the President may, from time to time, fix [*Art.* 324(2)].

From the beginning the Election Commission consisted of the Chief Election Commissioner only. The Congress(I) Government just a week before the commencement of the 9th General Election appointed two more Commissioners on 16th October, 1989 making it a multi-member Commission (According to critics, the haste with which new Members were appointed created a suspicion that it was an attempt to compromise the independence of the Commission). The National Front Government, on assuming charge, amended the rules to make it again a single-member body w.e.f. 2nd January, 1990. The conditions of service and tenure of office of the Election Commissioner shall be such as Parliament may by law prescribe: Provided that the Chief Election Commissioner cannot be removed from his office except in like manner and on like grounds as a Judge of the Supreme Court. In other words, the Chief Election Commissioner can only be removed by each House of Parliament, by a special majority and on the ground of proved misbehaviour or incapacity (and the other Election Commissioners shall not be removed by the President except on the recommendation of the Chief Election Commissioner).

The Election Commission shall have the power of superintendence, direction and conduct of all elections to Parliament and the State Legislatures and of elections to the offices of the President and Vice-President [*Art.* 324(1)].

Regional Commissioners may also be appointed by the President, in consultation with the Election Commission, on the eve of a general election to the House of the People or to the State Legislature, for assisting the Election Commission [*Art.* 324(4)].

On 1-10-1993 the Government promulgated an Ordinance[3] (which was subsequently converted into an Act) to provide for the appointment of two Election Commissioners. Soon thereafter two Commissioners were appointed. The distribution of work and the rules for transaction of business made in the Ordinance were challenged in the Supreme Court. The Court issued directions and the matter has been finally settled by upholding the validity of the Act.[4]

REFERENCES

1. See Chap. 11, *ante*.
2. The voting age has been lowered form 21 to 18, by the Constitution (61st Amendment) Act, 1989. Corresponding change has been effected by amending the Constitution of Jammu & Kashmir, by the 21st Amendment, 1989 to that State's Constitution.
3. The Ordinance has been replaced by Chief Election Commissioner and other Election Commissioners (Condititon of Service) Amendment Act, 1993 with effect from 4th January 1994.
4. *T.N. Seshan* v. *Union of India*, (1995) 4 S.C.C. 611.

CHAPTER 32

MINORITIES, SCHEDULED CASTES AND SCHEDULED TRIBES

IT was pointed out at the outset that *our* Constitution, being consecrated by the ideals of equality and justice both in the social and political fields, abolishes any discrimination either against or in favour of any class of persons on the grounds of religion, race or place of birth. It is in pursuance of this ideal that the Constitution did away with *communal* representation or reservation of seats in the Legislature or in the offices on the basis of religion.

It would have been a blunder on the part of the makers of *our* Constitution if, on a logical application of the above principle, they had omitted to make any special provisions for the advancement of those sections of the community who are socially and economically *backward*, for, the democratic march of a nation would be impossible if those who are handicapped are not aided at the start. The principle of democratic equality (as envisaged in the Preamble to the Constitution), indeed, can work only if the nation as a whole is brought on the same level, as far as that is practicable. *Our* Constitution, therefore, prescribes certain temporary measures to help the backward sections to come up to the same level with the rest of the nation, as well as certain permanent safeguards for the protection of the cultural, linguistic and similar rights of any section of the community who might be said to constitute a 'minority' from the numerical, *not communal*, point of view, in order to prevent the democratic machine from being used as an engine of oppression by the numerical majority.

Provisions for Protection of Minorities.

Any discussion of the provisions of our Constitution for the protection of the interests of the minorities can hardly fail to take notice of the palpably unfair comments of Sir Ivor Jennings[1] on this point:

> "Indeed, the most complete disregard of minority claims is one of the most remarkable features of Indian federalism. The existence of competing claims on religious and ethnic grounds was one of the reasons given for the refusal of Indian independence before 1940. By reaction the Congress politicians, who were above all nationalists, tended to minimize the importance of minority interests and emotions."

It is obvious that Sir Ivor would have been satisfied if the framers of *our* Constitution had perpetuated communal representation even after the country had been partitioned on the basis of a two-Nation slogan carried to the point of fanaticism, leading to a well-planned mass massacre. It is somewhat painful to point out to an Englishman that communal representation was not a natural limb of the Indian political system which was 'blindly' amputated by the nationalist Congress leaders but was an artificial growth which had been grafted upon our body politic by the Morley-Minto plan in the name of 'reform'.[2] An impartial student of Indian history may be expected to testify how, once the malignant growth had been implanted into our political life, every opportunity was seized by the imperialistic power to develop it as a wedge to separate the Indian people into two hostile camps so much so that it could eventually be advanced "as one of the reasons for the refusal of Indian independence". After those who were allured by the separatist vision had succeeded in dividing the motherland to create an exclusive home of their own, it must be presumed that those belonging to that very community who elected to remain in their birth-place should prefer to live with the other children of the soil as one family, after giving up all claims to separate treatment in the political *sphere*. It is only there that the objective of 'fraternity' assured by the Preamble would be fulfilled and the "integrity of the Nation" (*ibid*) could be achieved.

That the majority community has not abolished the communal representation with any selfish motives will be apparent from the very fact that notwithstanding the abolition of reservation, members of the minority community have been appointed to the highest offices of President, Vice-President, ministers, ambassadors, governors and judges of the superior courts in such numbers as can hardly be overlooked by an impartial observer. There is no reasonable ground for apprehending that the interests or development of the minority community have suffered because of the abolition of separate electorates on a communal basis.

The real injustice done by Sir Ivor, above all, is the omission to mention the religious, cultural and educational safeguards incorporated in the Constitution to protect the interests of *all minority groups*, whether they are religious, linguistic or cultural minorities. While some of these shall be a permanent feature of the Constitution, there are others of a temporary nature which will continue to operate only so long as the backward communities are lagging behind in the march of the nation. The safeguards for minorities and backward classes may, accordingly, be discussed under two heads—

I. PERMANENT PROVISIONS

Religious Freedom.

(i) Though the provisions guaranteeing religious freedom to every individual cannot, strictly speaking, be said to be specific safeguards in favour of the minorities, they do protect the *religious* minorities if we contrast the provisions of the successive Islamic Constitutions of Pakistan. *Our* Constitution does not contain any provision for the furtherance of any particular religion as may raise legitimate apprehensions in the minds of those who do not belong to that religion.

Linguistic and Cultural Rights guaranteed.

(ii) Any section of the citizens of India having a distinct language, script or culture of its own shall have the fundamental right to conserve the same [*Art.* 29(1)]. This means that if there is a cultural minority which wants to preserve its own language and culture, the State would not by law impose upon it any other culture belonging to the majority of the locality. This provision, thus, gives protection not only to religious minorities but also to linguistic minorities. The promotion of Hindi as the national language or the introduction of compulsory primary education cannot be used as a device to take away the linguistic safeguard of a minority community as guaranteed by Arts. 29-30.[3-4] In fact, both the Union and State Governments have been taking active steps, at Government expense, for the promotion of Urdu in order to appease Muslim sentiments (see next Chapter).

Facilities for Instruction in Mother-tongue.

(iii) The Constitution directs every State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups and empowers the President to issue proper direction to any State in this behalf [*Art.* 350A].

Special Officer for Linguistic Minorities.

(iv) A Special Officer for linguistic minorities shall be appointed by the President to investigate all matters relating to the safeguards provided for linguistic minorities under the Constitution and report to the President [*Art.* 350B].

Apart from this, Parliament has enacted the National Commission for Minorities Act, 1992 for monitoring the working of the safeguards provided in the Constitution and in Union and State laws.[5]

No discrimination in State Educational Institutions.

(v) No citizen shall be denied admission into any educational institution maintained by the State or receiving State aid, on grounds only of religion, race, caste, language or any of them [*Art.* 29(2)]. This means that there shall be no discrimination against any citizen on the ground of religion, race, caste or language, in the matter of admission into educational institutions maintained or aided by the State. It is a very wide provision intended for the protection not only of the religious minorities but also of 'local' or linguistic minorities, and the provision is attracted as soon as the discrimination is immediately based only on the ground of religion, race, caste, language or any of them.

The Government of Bombay issued an Order which directed that, subject to certain exceptions, no primary or secondary school receiving aid from Government should admit to a class where English was the medium of instruction, any pupil other than a pupil belonging to a section of the citizens the language of which was English, namely Anglo-Indians and citizens of non-Asiatic descent. An Indian citizen, other than an Anglo-Indian citizen, was denied admission to a State-aided school, in pursuance of the above Order. The Supreme Court *held* that the immediate ground for denial of admission of a pupil to such a School where English was the medium of instruction was that the mother-tongue of the pupil was *not* English. It was, thus, a denial of the right conferred by Art. 29(2), only on the ground of the language of the pupil. The argument that the object of the denial was to promote the introduction of Hindi or any other Indian language as the medium of instruction in the Schools was immaterial in determining whether Art. 29(2) had been contravened.[4]

Right to establish Educational Institutions of their choice.

(vi) All minorities, whether based on religion or language, shall have the fundamental right to establish and administer educational institutions of their choice [*Art.* 30(1)]. While Art. 29(1) enables the minority to maintain its language or script, the present clause enables them to run their own educational institution, so that the State cannot compel them to attend any other institutions, not to their liking.

By the 1978 amendment, favourable treatment has been accorded to such minority educational institutions in the matter of compensation for compulsory acquisition of property by the State. While, by reason of the repeal of Art. 31, all persons have lost their constitutional right to compensation for acquisition of their property by the State, including educational institutions belonging to the majority community, educational institutions established by a minority community lie entrenched in this behalf. Their property cannot be acquired by the State without payment of such compensation as would safeguard their right to exist, as is guaranteed by Art. 30(1A).

No Discrimination in State aid to Educational Institutions.

(vii) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language [*Art.* 30(2)].

The ambit of the above educational safeguards of all minority communities, whether religious, linguistic, or otherwise, can be understood only if we notice the propositions evolved by the Supreme Court out of the above guarantees:

(a) Every minority community has the right not only to establish its own educational institutions, but also to impart instruction to the children of its own community in its own language.[4]

(b) Even though Hindi is the national language of India and Art. 351 provides a special directive upon the State to promote the spread of Hindi, nevertheless, the object cannot be achieved by any means which contravenes the rights guaranteed by Art. 29 or 30.[4]

(c) In making primary education compulsory [*Art.* 45], the State cannot compel that such education must take place only in the schools owned, aided or recognised by the State so as to defeat the guarantee that a person belonging to a linguistic minority has the right to attend institutions run by the community, to the exclusion of any other school.[3]

(d) Even though there is no constitutional right to receive State aid, if the State does in fact grant aid to educational institutions, it cannot impose such conditions upon the right to receive such aid as would, virtually, drive the members of a religious or linguistic community of their right under Art. 30(1). While the State has the right to impose reasonable conditions, it cannot impose such conditions as will substantially deprive the minority community of its rights guaranteed by Art. 30(1). Surrender of fundamental rights cannot be exacted as the price of aid doled out by the State. Thus, the State cannot prescribe that if an institution, including one entitled to the protection of Art. 30(1), seeks to receive State aid, it must subject itself to the condition that the State may take over the management of the institution or to acquire it on its subjective satisfaction as of certain matters,—for such condition would completely destroy the right of the community to administer the institution.[3]

(e) Similarly, in the matter of the right to establish an institution in relation to recognition by the State, though there is no constitutional or other right for an institution to receive State recognition and though the State is entitled to impose reasonable conditions for receiving State recognition, *e.g.*, as to qualifications, it cannot impose conditions the acceptance of which would virtually deprive a minority community of their right guaranteed by Art. 30(1).[3]

Where, therefore, the State regulations debar scholars of unrecognised educational institutions from receiving higher education or from entering into the public services, the right to establish an institution under Art. 30(1) cannot be effectively exercised without obtaining State recognition. In such circumstances, the State cannot impose it as a condition precedent to State recognition that the institution must not receive any fees for tuition in the primary classes. For, if there is no provision in the State law or regulation as to how this financial loss is to be recouped, institutions, solely or primarily dependent upon the fees charged in the primary classes, cannot exist at all.[3]

(f) Minority institutions protected under Art. 30(1) are, however, subject to regulation by the educational authorities of the State to prevent mal-administration and to ensure a proper standard of education.[6] But such regulation cannot go to the extent of virtually annihilating the right guaranteed by Art. 30(1).[6]

No discrimination in Public Employment.

(viii) No person can be discriminated against in the matter of public employment, on the ground of race, religion or caste [*Art.* 16(2)].

Provisions for upliftment of the Scheduled Castes and Tribes, and other Backward Classes.

(ix) While the Constitution has abolished representation on *communal* lines, it has included safeguards for the advancement of the *backward* classes amongst the residents of India (irrespective of their *religious* affiliations), so that the country may be ensured of an all-round development. These provisions fulfil the assurance of "justice, social, economic and political" which has been held out by the very Preamble of the Constitution. A major section of such backward classes has been specified in the Constitution as Scheduled Castes and Scheduled Tribes because their backwardness is patent.

Scheduled Castes and Tribes.

There is no definition of Scheduled Castes and Scheduled Tribes in the Constitution itself. But the President is empowered to draw up a list in consultation with the Governor of each State, subject to revision by Parliament [*Arts.* 341-342]. The President has made Orders, specifying the Scheduled Castes and Scheduled Tribes in the different States in India, which have since been amended by Acts of Parliament.[7]

A. Special Provisions for Scheduled Castes and Tribes.

The Constitution makes various special provisions for the protection of the interests of the Scheduled Castes and Scheduled Tribes. Thus,

(i) Measures for the advancement of the Scheduled Castes and Scheduled Tribes are exempted [*Art.* 15(4)] from the general ban against discrimination on the grounds of race, caste, and the like, contained in Art. 15. It means that if special provisions are made by the State in favour of the members of these Castes and Tribes, other citizens shall not be entitled to impeach the validity of such provisions on the ground that such provisions are discriminatory against them.

(ii) On the other hand, while the rights of free movement and residence throughout the territory of India and of acquisition and disposition of property are guaranteed to every citizen, in the case of members of the Scheduled Castes and Scheduled Tribes, special restrictions may be imposed by the State as may be required for the protection of their interests. For instance, to prevent the alienation or fragmentation of their property, the State may provide that they shall not be entitled to alienate their property except with the concurrence of a specified administrative authority or except under specified conditions [*Art.* 19(5)].

(iii) The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of the efficiency of the administration, in the making of appointments[8] to services and posts in connection with the affairs of the Union or of a State [*Art.* 335].

(iv) There shall be a National Commission for the Scheduled Castes to be appointed by the President [*Art.* 338].[9] It shall be the duty of this Commission to investigate all matters relating to the safeguards provided for the Scheduled Castes under this Constitution and to report to the President upon the working of those safeguards annually or at such intervals as it may deem fit, and the President shall cause all such reports to be laid before each House of Parliament. A similar provision for similar purposes has been made for the appointment of a National Commission for the Scheduled Tribes by inserting Art. 338A.[10]

(v) The President may, at any time, and shall, at the expiration of ten years from the commencement of this Constitution, by Order appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States. The Order may define the composition, powers and procedure of the Commission and may contain such incidental or ancillary provisions as the President may consider necessary or desirable [*Art.* 339(1)].

(vi) The executive power of the Union shall extend to the giving of directions to any such State as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the Scheduled Tribes in the State [*Art.* 339(2)].

With a view to associate members of Parliament and other members of the public in the due discharge of the above functions by the Government of India, three Parliamentary Committees have been set up. Their function is to formulate and review the working of schemes for the welfare of the

Scheduled Castes and Scheduled Tribes and to advise the Government of India on matters relating to these castes and tribes.

(vii) Financial aid for the implementation of these welfare schemes is provided for in Art. 275(1) which requires the Union to give grants-in-aid to the States for meeting the costs of schemes of welfare of the Scheduled Tribes and for raising the level of administration of the Scheduled Areas in a State to that of the administration of the areas of that State.

(viii) Proviso to Art. 164 lays down that in the States of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare, who may also be in charge of the welfare of the Scheduled Castes and other backward classes.

In practice, such Welfare Departments have been set up not only in these three States as required by the Constitution, but also in other States.

(ix) Special provisions are laid down in the Fifth and Sixth Schedules of the Constitution, read with Art. 244, for the administration of areas inhabited by Scheduled tribes.

Over and above all these, there is a general Directive in Art. 46 that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Besides, there are temporary provisions for special representation of and reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislatures [*Arts.* 330, 332, 334][11-12] which will be treated separately, hereafter.

By amending Art. 338 the Constitution (65th Amendment) Act, 1990, a National Commission has been set up for investigating and reporting on the working of the foregoing safeguards regarding the Scheduled Castes and Scheduled Tribes.[9]

B. For Backward Classes, Generally.

Not contented with making special provisions for the Scheduled Castes, who form a specific category of socially depressed people (generally identifiable with the Gandhian term '*harijan*'), the Constitution has made separate provisions for the amelioration and advancement of all 'backward classes', in general.

Of course, the Constitution does not define 'backward classes'. The Scheduled Castes and Scheduled Tribes are no doubt backward classes, but the fact that the Scheduled Castes and Scheduled Tribes are mentioned together with the expression 'backward classes' in the foregoing provisions shows that there may be other backward classes of people besides the Scheduled Castes and Scheduled Tribes. The Constitution provides for the appointment of a 'Commission to investigate the conditions of backward classes' [*Art.* 340]. Such a Commission was appointed in 1953 (with Kaka Saheb Kalelkar as Chairman), with the following terms of appointment—

(a) To determine the tests by which any particular class or group of people can be called 'backward'.

(b) To prepare a list of such backward communities for the whole of India.

(c) To examine the difficulties of backward classes and to recommend steps to be taken for their amelioration.

This Commission submitted its report to the Government in 1955, but the tests recommended by the Commission appeared to the Government to be too vague and wide to be of much practical value; hence, the State Governments have been authorised to give assistance to the backward classes according to the lists prepared by the State Governments themselves.

The second Backward Classes Commissioner, Mr. B.P. Mandal, submitted his report in 1980. In August 1990, the Government declared reservation of 27% seats in government service on the basis of this report. This was challenged as unconstitutional. A nine-Judge Bench has decided this case in November, 1992, rejecting that challenge.[13] (For the mainpoints in the judgment, see Chap. 8 under ."Mandal Commission case".)

The Court has not itself enumerated the 'backward classes' but has directed the Government to set up a Commission[14] to specify the backward classes, in the light of the principles laid down by the Court.[14]

Following the recommendations of the Commission the Central Government has reserved 27% seats in all recruitments to be made from 9th September, 1993.

In has already been pointed out that the Proviso to Art. 164(1) provides for a Minister in charge of the welfare of backward classes and that departments for such welfare have, in fact, been opened in all the States.

Special provisions for the Anglo-Indian Community.

Even apart from the foregoing safeguards, provisions were made in the Constitution in the interests of the Anglo-Indian community, in view of their peculiar position in Indian society (*see below*).

An Anglo-Indian is defined in Art. 366(2) as—

> "a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only."

The Special Officer for Scheduled Castes and Scheduled Tribes was to investigate into and report on the working of the foregoing safeguards relating to the Anglo-Indian community [*Art.* 338(3)]. This provision has been repealed by the 65th Amendment Act, 1990.

II. TEMPORARY PROVISIONS

Let us now advert to other provisions for the advancement of the Scheduled Castes and Scheduled Tribes as well as the Anglo-Indian community, which were intended to be of a temporary duration,—just sufficient to enable them to come up to the level of the general body of citizens:

(a) Seats shall be reserved in the House of the People[11] for—(a) The Scheduled Castes; (b) The Scheduled Tribes except the Scheduled Tribes in the tribal areas of Assam; and (c) The Scheduled Tribes in the autonomous districts of Assam [*Art.* 330].

Seats shall also be reserved for the Scheduled Castes and the Scheduled Tribes, except the Scheduled Tribes in the tribal areas of Assam, in the Legislative Assembly[11] of every State [*Art.* 332]. Such reservation will cease on the expiration of *sixty* years[12] from the commencement of the Constitution, *i.e.*, in January, 2000 A. D. [*Art.* 334].

(b) The President may, if he is of opinion that the Anglo-Indian community is not adequately represented in the House of the People, nominate not more than two members of that community to the House of the People [*Art.* 331]. The Governor has a similar power in respect of the Legislative Assembly of the State, but in the case of a Governor, the maximum quota, fixed by the Constitution (23rd Amendment) Act, 1969 is—*one* member of the community for the Legislative Assembly [*Art.* 333]. Such power shall cease after sixty years[12] from the commencement of the Constitution.

(c) The provisions for reservation for Anglo-Indians in certain services of the Union [*Art.* 336] or for special educational grants [*Art.* 337] have already expired.

REFERENCES

1. *Some Characteristics of the Indian Constitution*, 1953, p. 64.
2. Thanks are due to Prof. Gledhill that he does not fail to notice this [(1959) *Journal of Indian Law Institute*, p. 406].
3. Re: *Kerala Educaiton Bill*, AIR 1958 S.C. 956
4. *State of Bombay* v. *Bombay Education Society*, (1955) 1 S.C.R. 568.
5. For text of this Act, see App. III of the 14th Ed., 2008 of Author's *Shorter Constitution of India*.
6. *State of Kerala* v. *Mother Provincial*, AIR 1970 S.C. 2079; *St. Xavier's College* v. *State of Gujarat*, AIR 1974 S.C. 1389; *Sidhrajbhai* v. *State of Gujarat*, AIR 1963 S.C. 540.
7. Scheduled Castes and Scheduled Tribes form 24.56 per cent of the total population of the country (*India 2001*, p. 14).
8. *Balaji* v. *State of Mysore*, AIR 1963 S.C. 649 (*656, 658*).
9. For the text of new Art. 338, see Author's *Constitutional Law of India*, 6th Ed., p. 390.
10. *Vide* The Constitution (Eighty-ninth Amendment) Act, 2003, Sec. 3 (w.e.f. 19.2.2004).
11. In 2008, out of 543 seats in the House of the People, 84 are reserved for representatives of the Scheduled Castes and 47 for representatives of the Scheduled Tribes. Two President's nominees from Anglo-Indians. In the Legislative Assemblies, on the other hand, out of an aggregate of 4,120 seats, 607 are reserved for the Scheduled Castes and 553 for the Scheduled Tribes [*vide* the Representation of the People (Amendment) Act, 2008, Sec. 8].
12. The period of ten years prescribed in the original Constitution was extended to twenty years by the Constitution (8th Amendment) Act, 1959, and, then, to thirty years, by the Constitution (23rd Amendment) Act, 1969, on the gorund that the object of the safeguard had not yet been fulfilled. This has been further extended to *forty* years, by the Constitution (45th Amendment) Act, 1980, to *fifty* years by the Constitution (62nd Amendment) Act, 1989, w.e.f. 20-12-1989 and to *sixty* years by the Constitution (79th Amendment) Act, 1999, w.e.f. 25-1-2000 [Art. 334] and to *sixty* years by the Constitution (79th Amendment) Act, 1999 (w.e.f. 25-1-2000).
13. *Indra Sawhney* v. *Union of India*, (1992) Supp. (3) S.C.C. 217.
14. Parliament has already enacted the National Commission for Backward Classes Act, 1993, for this purpose. For text see App. V of the Author's *Shorter Constitution of India*, 14th Ed., 2008. This came into force on 1st February, 1993. In August, 1993 a 5-member Commission has been constituted. Justice R.N. PRASAD was its chairman.

CHAPTER 33

LANGUAGES

Languages.

LANGUAGES offered a special problem to the makers of the Constitution simply because of the plurality of languages used by the vast population of 1,02,87,37,436 according to 2001 census (*vide* India 2008, page 7). It is somewhat bewildering to think that no less than 1,652 spoken languages, including 63 non-Indian languages, are current in this sub-Continent.

Need for an Official Language.

The makers of the Constitution had, therefore, to select some of these languages as the recognised medium of official communication in order to save the country from a hopeless confusion. Fortunately for them, the number of people speaking each of these 1,652 languages was not anything like proportionate and some 22[1] languages (included in the 8th Schedule of the Constitution, see Table XX) could easily be picked up as the major languages of India, used by 91 per cent of the total population of the country, and out of them, Hindi, including its kindred variants Urdu and Hindustani, could claim 46 per cent. Hindi Devanagari script was accordingly prescribed as the official language of the Union (subject to the continuance of English for the same purpose for the limited period of 15 years), and, for the development of the Hindi language as a medium of expression for all the elements of the composite culture of India, the assimilation of the expressions used in the other languages specified in the Eighth Schedule was recommended [*Art.* 351].

But though one language was thus prescribed for the official purposes of the Union, and the makers of the Constitution sought to afford relief to regional linguistic groups by allowing the respective State Legislatures [*Art.* 345] and the President [*Art.* 347] to recognise some language or languages other than Hindi as the languages for intra-State official transactions or any of them. These provisions thus recognise the right of the majority of the State Legislature or a substantial section of the population of a State to have the language spoken by them to be recognised for official purposes within the State.

In the result, the provisions of the Constitution relating to Official Language have come to be somewhat complicated [*Arts.* 343-351].

Official Language.

The Official language of the *Union* shall be Hindi in Devanagri script [*Art.* 343]. But, for a period of fifteen years from the commencement of this Constitution, the English language shall continue to be used for *all* the official purposes of the Union for which it was being used immediately before such commencement. Even after the expiry of the above period of 15 years, Parliament *may* by law provide for the use of—

A. *Of the Union.*

(a) The English language, or

(b) The Devanagri form of numerals, for such purposes as may be specified in the law [*Art.* 343].

In short, English would continue to be the official language of the Union side by side with Hindi, until 1965, and thereafter the use of English for any purpose will depend on Parliamentary legislation. Parliament has made this law by enacting the Official Languages Act, 1963, which will be presently noted.

Official Language Commission.

The Constitution provides for the appointment of a Commission as well as a Committee of Parliament to advise the President as to certain matters relating to the official language [*Art.* 344]. The Official Language Commission is to be appointed at the expiration of 5 years, and again at the expiration of 10 years, from the commencement of the Constitution. The President shall constitute the Commission with the representatives of the recognised languages specified in the Eighth Schedule.[1] It shall be the duty of the Commission to make recommendations to the President as to—

(a) the progressive use of the Hindi language for the official purposes of the Union;

(b) restrictions on the use of the English language for any of the official purposes of the Union;

(c) the language to be used for proceedings in the Supreme Court and the High Courts and the texts of legislative enactments of the Union and the States as well as subordinate legislation made thereunder;

(d) the form of numerals to be used for any of the official purposes of the Union;

(e) any other matters referred to the Commission by the President as regards—

(1) the official language of the Union, and

(2) the language for communication between the Union and the States or between one State and another.

In making its recommendations, the Commission shall have due regard to the industrial, cultural and scientific advancement of India and the just claims and interests of persons belonging to the non-Hindi speaking areas in regard to Public Services.

The recommendations of the Commission will be examined by a Joint Parliamentary Committee consisting of thirty members of whom twenty shall be elected from the Lok Sabha and ten from the Rajya Sabha in accordance with the system of proportional representation by single transferable vote. The Committee will examine the recommendations of the Commission and report their opinion to the President.

Implementation of the Recommendations of the First Official Language Commission.

The Official Language Commission was, accordingly, appointed in 1955 with Sri B.G. Kher as Chairman, and it submitted its Report in 1956, which was presented to Parliament in 1957 and examined by a joint Parliamentary Committee. The recommendations of the Parliamentary Committee upon a consideration of the Report of the Official Language Commission were as follows—

(a) The Constitution contains an integrated scheme of official language and its approach to the question is flexible and admits of appropriate adjustment being made within the framework of the scheme.

(b) Different regional languages are rapidly replacing English as a medium of instruction and of official work in the States. The use of an Indian language for the purposes of the Union has thus become a matter of practical necessity, but there *need be no rigid date-line for the change-over.* It should be a natural transition over a period of time effected smoothly and with the minimum of inconvenience.

(c) English should be the principal official language and Hindi the subsidiary official language till 1965. After 1965, when Hindi becomes the principal official language of Union, *English should continue as the subsidiary official language.*

(d) No restriction should be imposed for the present on the use of English for any of the purposes of the Union and provision should be made in terms of Cl. (3) of Art. 343 for the continued use of English even after 1965 for purposes to be specified by Parliament by law as long as may be necessary.

(e) Considerable importance attaches to the provision in Art. 351 that Hindi should be so developed that it may serve as a medium of expression for all elements of the composite culture of India, and every encouragement should be given to the use of *easy* and *simple* diction.

Two Standing Commissions.

In pursuance of the above recommendations of the Parliamentary Committee the President issued an Order[2] on April 27, 1960, containing directions by way of implementing the above recommendations. The main direction was as regards the evolution of Hindi terminology for scientific, administrative and legal literature and the translation of English literature on administrative and procedural matters into Hindi. For the evolution of such terminology, the Official Language Commission recommended the constitution of two *Standing Commissions.* (A) For the development of legal terminology and preparation of authoritative texts of Central Acts in Hindi and other languages a Commission [known as the Official Language (Legislative) Commission] was constituted in 1961. It was abolished in 1976 and its functions have been assigned to the Legislative Department of the Government of India. (B) The other Commission [known as the Commission for Scientific and Technical Terminology] is working under the Ministry of Human Resources.

Of the other recommendations of the Official Language Commission, the following, *inter alia,* were adopted in the President's Order:[2]

(i) English shall continue to be the medium of examination for the recruitment through the Union Public Service Commission but, after some time, Hindi may be admitted as an alternative medium, both Hindi and English being available as the media at the option of the candidate.

(ii) Parliamentary legislation may continue to be in English but an authorised translation should be provided in Hindi. For this purpose, the Ministry of Law has been directed to provide for such translation and also to initiate legislation to provide for an authorised Hindi translation of the text of Acts passed by Parliament.

(iii) Where the original text of Bills introduced or Acts passed by a State Legislature is in a language other than Hindi, a Hindi translation may be published with it besides an English translation as provided in Cl. (3) of Art. 348.

(iv) When the time comes for the change-over, Hindi shall be the language of the Supreme Court.

(v) Similarly, when the time for change-over comes, Hindi shall ordinarily be the language of judgments, decrees or orders of Courts, *in all regions;* but, by undertaking necessary legislation, the use of a regional official language may be made optional instead of Hindi, with the previous consent of the President.

B. *Of Inter-State Communications.*

The Constitution further provides that the language for the time being authorised for use in the Union for official purposes (*i.e.*, English) shall be the official language of communication between one State and another State and between a State and the Union. If, however, two or more States agree that the Hindi language should be the official language for communication between such States, that language may be used for such communication instead of English [*Art.* 346].

C. *Of a State.*

The Legislature of a State may by law[3] adopt any one or more of the languages in use in the State or Hindi as the language to be used for all or any of the official purposes of that State: Provided that, until the Legislature of the State otherwise provides by law, the English language shall continue to be used for those official purposes within the State for which it was being used immediately before the commencement of this Constitution.

There is also a provision for the recognition of any other language for the official purposes of a State or any part thereof, upon a substantial popular demand for it being made to the President [*Art.* 347].

D. *Language to be used in the Supreme Court and in the High Courts and for Acts, Bills, etc.*

Until Parliament by law otherwise provides—

(a) all proceedings in the Supreme Court and in every High Court,

(b) the authoritative texts—

(i) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State,

(ii) of all Acts passed by Parliament or the Legislature of a State and of all Ordinances promulgated by the President or the Governor of a State, and

(iii) of all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State,

shall be in the English language.

A State Legislature may, however, prescribe the use of any language other than English for Bills and Acts passed by itself, or subordinate legislation made thereunder. Similarly, the Governor of a State may, with the previous consent of the President, authorise the use of Hindi or any other language used for official purposes of the State, in proceedings in the High Court of the State, but not in judgments, decrees or orders (which must continue to be in English until Parliament by law otherwise provides) [*Art.* 348].

The foregoing provisions of the Constitution *are now to be read subject to* the modifications made by the Official Languages Act, 1963 and the Authorised Translations (Central Laws) Act, 1973 and the new Art. 394A, inserted in the Constitution in 1987.

Authorised Translations (Central Laws) Act, 1973.

In 1973, Parliament enacted the Authorised Translations (Central Laws) Act, 1973, to provide that when a Central Law is translated into a regional language (other than Hindi), and published in the Official Gazette, under the authority of the President, such translation shall be deemed to be the authorised translation thereof in such language.

Art. 394A.

The Draft Constitution as well as the Constitution adopted by the Constituent Assembly on the 26th November, 1949, was in the English language. After it was officially translated into Hindi, Art. 394A was inserted into the Constitution, by the 58th Amendment Act, 1987, in order to give it effective authority. In pursuance of this Article, the President published in the Gazette of India, the Hindi text which, according to Cl. (2) of Art. 394A, shall be construed to have the same meaning as the original text in the English language, and in case of any difficulty arising in this matter, the President shall direct the Hindi text to be suitably revised.

The provisions of the Official Languages Act (as amended) are—

Official Languages Act, 1963.

I. *Continuance of English Language for Official Purposes of the Union and for Use in Parliament.* Notwithstanding the expiration of the period of fifteen years from the commencement of the Constitution, the English language may, as from the appointed day, continue to be used, *in addition to Hindi,*—

(a) for all the official purposes of the Union for which it was being used immediately before that day; and

(b) for the transaction of business in Parliament.

II. *Authorised Hindi Translation of Central Acts, etc.* (1) A translation in Hindi published under the authority of the President in the Official Gazette on and after the appointed day,—

(a) of any Central Act or of any Ordinance promulgated by the President, or

(b) of any order, regulation or bye-law issued under the Constitution or under any Central Act,

shall be deemed to be authoritative text thereof in Hindi.

(2) As from the appointed day the authoritative text in the English language of all Bills to be introduced or amendments thereto to be moved in either House of Parliament shall be accompanied by a translation of the same in Hindi authorised in such manner as may be prescribed by rules made under this Act.

III. *Authorised Hindi Translation of State Acts in Certain Cases.* Where the Legislature of a State has prescribed any language other than Hindi for use in Acts passed by the Legislature of the State or in Ordinances promulgated by the Governor of the State, a translation of the same in Hindi, in addition to a translation thereof in the English language as required by Cl. (3) of Art. 348 of the Constitution, may be published on or after the appointed day under the authority of the Governor of the State in the Official Gazette of that State and in such a case, the translation in Hindi of any such Act or Ordinance shall be deemed to be the authoritative text thereof in the Hindi language.

IV. *Optional Use of Hindi or other Official Language in Judgments, etc., of High Courts.* As from the appointed day or any day thereafter, the Governor of a State may, with the previous consent of the President, authorise the use of Hindi or the official language of the State, in addition to the English language, for the purposes of any judgment, decree or order passed or made by the High Court for that State and where any judgment, decree or order is passed or made in any such language (other than the English language), it shall be accompanied by a translation of the same in the English language issued under the authority of the High Court.

V. *Inter-State Communications.* (a) English shall be used for purposes of communication between the Union and a State which has *not* adopted Hindi as its official language. (b) Where Hindi is used for purposes of communication between one State and another which has *not* adopted Hindi as its official language, such communication in Hindi shall be accompanied by an English translation thereof.

Special Directives relating to Languages.

The Constitution lays down certain special directives in respect of not only the official language but also the other languages in use in the different parts of the country, in order to protect the interests of the linguistic minorities.

A. As regards the *official* language—the directive is, of course, for the promotion and development of the Hindi language so that it may serve as a medium of expression for all the elements of the composite culture of India and this is laid down as a duty of the Union; and the Union is further directed to secure the enrichment of Hindi, by assimilating without interfering with its genius, the forms, style and expressions, used in the Hindustani and other languages (specified in the Eighth Schedule) and by

Sanskrit neglected.

giving primary importance to *Sanskrit* in this respect [*Art.* 351]. The Government of India has already implemented this directive by taking a number of steps for the popularisation of Hindi amongst the non-Hindi speaking people, particularly its own employees.[4] But not enough has been done for the promotion of Sanskrit so as "to secure the enrichment of Hindi *by drawing on Sanskrit*", which the State is enjoined to do, by Art. 351. The views of the Author regarding importance of Sanskrit have been supported by the Supreme Court.[5] The Court has clearly spelt out that in view of the importance of Sanskrit for nurturing our cultural heritage it is necessary to include it as an elective subject at the secondary school level. The Education Minister of the Charan Singh Government promised to set up a Sanskrit Academy, but that Government did not survive to implement it.[6]

Violation of Arts. 27, 351.

On the other hand, an Urdu Academy has been set up in West Bengal, at Government expense, on October 27, 1979. There cannot be any objection from any enlightened man to any effort for the promotion of any Indian language, at least any of those specified in the 8th Schedule. But there is a constitutional aspect which does not appear to have been duly considered by the authorities. If the newspaper reports be correct, one of the objectives of this Academy is to translate religious scriptures like the Quoran, at the expense of the Academy.[7] If the resources of the Academy be the public revenues, raised by taxation, any appropriation of such resources for the promotion or maintenance of any 'particular religion' shall be hit by Art. 27. The reason behind Art. 27 is that India is a 'secular State' where all religions are on a status of equality so far as the State is concerned. If the contrary be permissible some other State Government may set up a language Academy for the translation and dissemination of the scriptures of the Hindus like the Vedas, Bhagavad-Gita, while another Government may take up the translation and propagation of the Bible and so on, resulting in conflicts between the different religions under the auspices of the State.

If the State really wants to promote the languages at Government expenses, the only constitutional way would be to set up an Academy of languages, embracing *all* the languages in the 8th Schedule, so that Sanskrit, Urdu, Bengali, etc., would have an equal treatment, and all religious activities should be excluded from the programme of such an Academy, because there being numerous religions in India, there is a likelihood of some religion being excluded in the venture, leading to a violation of Art. 27.[8]

As regards research into the Sanskrit language for enriching the vocabulary of Hindi [*Art.* 351], a branch should be opened specifically for this purpose and, if any activities are already being undertaken, they should be speeded up and the glossaries produced should be available to the people at a low cost. The extension of such an organisation itself will provide employment to Sanskrit scholars and thus provide incentive to the otherwise unprofitable study of Sanskrit.

B. For the protection of the *other* languages in use, the following directives are provided—

(i) For the submission of representation for the redress of any grievance to any officer or authority of the Union or a State, the petitioner is authorised to use any of the languages used in the Union or in the State, as the case may be [*Art.* 350]. In other words, a representation *cannot* be rejected on the ground that it is not in Hindi.

(ii) Every State and other local authority within a State is directed to provide adequate facilities for instruction in the *mother-tongue* at the preliminary stage of education to children belonging to linguistic minority groups and the President is authorised to issue such directions to any State as he may consider necessary for the securing of such facilities [*Art.* 350A].

(iii) A Special Officer for linguistic minorities shall be appointed by the President to investigate all matters relating to the safeguards provided by the Constitution for linguistic minorities and to report to the President upon those matters. It shall be the duty of the President to cause all such reports to be laid before each House of Parliament and also to be sent to the Government of the State concerned [*Art.* 350B].

REFERENCES

1. The original Constitution enumerated 14 languages. This number became 15, by the addition of 'Sindhi', by the Constitution (21st Amendment) Act, 1967. The 71st Amendment Act, 1992 added Konkani, Nepali and Manipuri to make it 18. The 92nd Amendment Act, 2003 added Bodo, Dogri, Mathilli and Santhali to make it 22.
2. *India, 1961*, p. 547.
3. In January, 1987, the Goa Legislative Assembly has passed the Goa Language Act, making Konkani as an official language of the Union Territory, in addition to Marathi/Gujarati.
4. *India, 1984,* pp. 69ff.
5. *Santosh* v. *Secretary*, (1994) 6 S.C.C. 579.
6. Recently, an organisation called *Rashtriya Sanskrit Sansthan* has been set up at New Delhi, but its efforts are primarily directed towards the promotion of the study of Sanskrit at the higher level [*India*, 1987, p. 91]. Unless Sanskrit is made a compulsory subject at the root, none would be available in the next generation to carry on post-Graduate study in Sanskrit. The Sansthan should also be transformed into a Sanskrit Academy, with power to translate Sanskrit scriptures and literary works, just as the Urdu Academy established by the L.F. Government in West Bengal, has.

   In should never be forgotten that Sanskrit is the base of Indian 'heritage and culture' which the Constitution seeks to ensure [*Arts.* 51A(f); 351]. Anything added to it has taken place after the Sanskritic culture had prevailed over this land for some three or four thousand years.
7. Such objective will not be covered by Art. 350A, noted under head B.
8. See, further, Author's *Commentary on the Constitution of India*, 6th Ed., Vol. D, pp. 220-21, f.n. 6.

CHAPTER 34

HOW THE CONSTITUTION HAS WORKED

I. ONE who has to study the Indian Constitution today may come to grief if he has in his hand only a text of the Constitution as it was promulgated in November, 1949, for, momentous changes have since been introduced not only by numerous Amendment Acts but by scores of judicial decisions emanating from the highest tribunal of the land. Nearly every provision of the original Constitution has acquired a gloss either from formal amendment or from judicial interpretation, and an account of the working of the Constitution, over and above this, would in itself be a formidable one.

Multiple Amendments of the Constitution.

At the first instance, the passing of ninety four Amendment Acts (see Table IV, *post*) in a period of fifty nine years can hardly be passed over unnoticed. In the *American* Constitution, the process of formal amendment prescribed by the Constitution to changes in social conditions has fallen into the hands of the Judiciary even though it ostensibly exercises the function only of interpreting the Constitution. Instead of leaving the matter to the slow machinery of judicial interpretation, *our* Constitution has vested the power in the people's representatives and, though the final power of *interpretation* of the Constitution as it stands at any moment belongs to the *Courts,* the power of changing the instrument itself has been given to Parliament (with or without ratification by the State Legislatures) and, if Parliament, acting as the constituent body, considers that the interests of the country so require, it can amend the Constitution as often as it likes. The ease with which these Amendments have been enacted demonstrates that our Constitution contains the potentiality of peacefully adopting changes some of which would be considered as revolutionary in other countries.

The real question involved in this context is whether it is the Judiciary or a constituent body which should be entrusted with this task of introducing changes in order to keep pace with the exigencies of national and social progress. For reasons good or bad, the framers of our Constitution preferred the Legislature as the machinery for introducing changes into the Constitution, but the need for change is acknowledged even in countries like the *U.S.A.* where the task has been assumed by the Judiciary, taking advantage of the fact that the amending machinery provided in the Constitution was too heavy and unwieldy for practical purposes.

A little reflection will show that some of these changes, the need for which must be admitted even by critics, could not have been introduced by the Courts, by the application of the canons of statutory interpretation which are firmly embedded in our Courts. An instance to the point is the insertion of the word 'reasonable' to qualify the word 'restrictions' in Cl. (2) of Art. 19 (by the First Amendment). Without such a qualification, the engine of judicial review would have been altogether excluded from the field of legislative encroachment upon the freedom of expression, for, it was not open to any Court, unless it was determined to do violence to the canons of interpretation, to supply the word 'reasonable' which had been inserted by the makers of the Constitution in all other Clauses of the Article but omitted from Cl. (2). The Seventh Amendment, again, was necessary to provide for the territorial reorganisation of the country which could not be made by the makers of the Constitution, before promulgating it in 1949. Similarly, the Tenth, Twelfth, Thirteenth, Fourteenth, Thirty-fifth, Thirty-sixth, and many other Amendments have been necessitated by the acquisition of new territories or the upliftment of the political status of existing territories, which are obviously for the benefit of the nation.

At the same time, one cannot help observing that so frequent and multifarious amendments of the Constitution, some of which might have been avoided or consolidated, have undermined the sanctity of the Constitution as an organic instrument.

Vital changes made by the 42nd to 44th Amendments.

Special mention should, however, be made of the 42nd Amendment Act, 1976, by which Congress Government, taking advantage of its monolithic control over the Union as well as the State Legislatures, effected comprehensive changes in the Constitution, overturning some of its bedrocks.[1] So widespread and drastic was the impact of this Amendment Act that it would be proper to call it an Act for 'revision', rather than 'amendment' of the Constitution.

As a result of popular resentment against such drastic changes, the Janata Party was voted to power at the general election which was held as a result of dissolution of the Lok Sabha at the instance of Mrs. Gandhi early in 1977. After several reverses, owing to their lacking a 2/3 majority in the Rajya Sabha, the Janata Government succeeded in enacting the 43rd and 44th Amendment Acts (1977, 1978), which wiped out many of the new provisions introduced by the 42nd Amendment Act, restoring the pre-1976 text of the Constitution, on many points. But the total elimination of the right to *property* from the Part on Fundamental Rights is an additional contribution of the Janata Government, which is bound to have far-reaching effects.

A case for revision of the Constitution, instead of piecemeal amendments.

But in view of the mutilation of the Constitution so far made by endless piecemeal amendments, inevitably resulting in confusion and inflicting injury upon the dignity and solemnity of the Constitution, an impartial observer may suggest that a Commission for the revision of the Constitution should be set up to examine, objectively, each of the existing provisions in the light of suggestions for amendment from the Government as well as the citizens and to recommend the enactment of one comprehensive Amendment Act or a revision of the Constitution itself. In a country like the United States where the written Constitution is sanctified as the Bible of the Nation, nobody could imagine that a Government, because it commands unquestionable majority in the Legislature, should amend the Constitution as often demanded by its Departments or in the manner recommended by the political Committees of the Party in power, as has happened in the case of the 42nd, 43rd and 44th Amendments in India.

In case the Government ever accepts the Author's suggestion to revise the Constitution,[2] the further suggestion is that the Constitution should be amplified, by inserting in it provisions relating to matters on which it is silent, or it is left to conventions or the goodwill of those who are to administer those matters respectively,—because in the absence of such codified provisions, much confusion has arisen not only amongst the masses who have little knowledge about the British conventions of Cabinet Government or the common law privileges of the British Parliament, but amongst the administrators themselves. Though many such instances may be found upon a thorough examination, I shall illustrate my point with reference to these two instances.

To codify:
A. Conventions.

A. Though the Cabinet system of government was adopted by the framers of the Indian Constitution both at the Union and State (subject to the discretionary sphere left to the State Governor) levels, the British Cabinet system is a complicated outcome of history and the sagacity of trained politicians and even then, as veteran scholars have pointed out, it is a difficult task to formulate clear-cut propositions, relating to the conventions upon which the system is founded. Naturally, in India, there has been much controversy both at the Centre and the States to what course should be taken by the President or the Governor in the matter of selecting a person to form a government in a situation where no party commands a clear majority; conversely, what action should be taken by the constitutional head of the State where it is alleged against a party in power that it has lost majority in the popular House of the Legislature by reason of defection or the like; whether the constitutional head has the power to dismiss the Prime Minister or Chief Minister, *i.e.*, the Council of Ministers collectively, and, if so, when. Though there is scope for controversy on such questions, it is not wholesome for the country if the Governors of two States or the President of the Union take divergent steps in the same or similar situation. Questions relating to the exercise of the pardoning or Ordinance-making powers have also created confusion. Even though it may not be possible to make comprehensive provisions relating to such matters or to apprehend all possible situations of doubt or controversy, it would be possible and profitable to formulate those propositions which have already been laid down by the Supreme Court or on which there has been a fair amount of consensus amongst the political parties as a result of the working of the Constitution for about fifty nine years.

B. Privileges of Legislatures.

B. When the Constitution was drafted in 1948-49, the uncodified privileges of the British House of Commons were sanctified by the Indian Constitution, but *only as a temporary measure,* because it was not practicable, at once, to grapple with the difficult problem of codifying the mass of British precedents which constitute the foundation of privileges of Parliament in

England. But almost six decades have passed since then, and today, even if the task of a fairly exhaustive codification may not be completed all at once, many of the principles have been settled by judicial decisions of the highest Court and the consensus of precedents laid down by the Presiding Officers of the Houses of the Union and State Legislatures. It is not conducive to a smooth working of the Parliamentary system in this poor and developing country to have a war between the Courts and the Legislatures as has happened on occasions,[3]—a repetition of which can be averted only by a proper solution embodied in the Constitution itself. Those who still argue in favour of a 'High Court of Parliament', exercising powers and privileges, such as the British House of Commons, are blinded by the initial fallacy that we have a written Constitution which *limits* the powers of all the organs of the State, including the Legislatures and that the latter cannot claim any overriding power (in the name of privileges) to interfere with the jurisdictions vested in the superior Courts by Arts. 32 and 226 of the Constitution itself. The Constitution-amending body can no longer fight shy of facing this unfortunate and uncanny problem of which there cannot be any authoritative solution so long as the Constitution itself is not amended, to incorporate that solution which is acceptable to the special majority of the constituent body. Even if the code of privileges be not exhaustive it is better to start with a nucleus rather than a vacuum.

Implementation of the Directive Principles.

II. Of the achievements of the Executive and the Legislature in the working of the Constitution, one cannot fail to refer to the progress made in implementation of the Directive Principles of State Policy, which shows that the Government in power has not taken them as 'pious homilies', as was apprehended by critics when they were engrafted into the Constitution. Though the implementation of these Directives falls mostly within the province of the States, the Union has offered its guidance and assistance through the Planning Commission. The Constitution of India, it should be remembered, was not intended to serve merely as a charter of government but as a means to achieve the social and economic transformation of the country peacefully and this goal has been achieved to the extent that the Government has succeeded in implementing the Directive Principles.

By the insertion of Art. 31C by the Constitution (25th Amendment) Act, 1971, the Congress Government demonstrated that it was determined to implement the directives and that if the Fundamental Rights came in the way, it would not hesitate to amend even the Fundamental Rights. The Supreme Court has also adhered to this view,[4] though in its earlier decisions, it had imputed pre-eminence to the Fundamental Rights.

The greatest failure of the Government in implementing the Directives has been with respect to the enactment of a uniform civil code [*Art.* 44], which we shall presently see.

In enforcing the Directive for Prohibition of consumption of intoxicants, too, some Governments are giving more importance to revenue than the 'fundamental principle of governance' embodied in Art. 47. That is why it has not been substantially implemented in the course of almost six decades. Some State Governments have gone to the extent of withdrawing it after having once imposed Prohibition.

Trend towards the Unitary System.

III. In the federal sphere, it may be stated that most of the formal and informal changes which have taken place since the commencement of the Constitution have been to strengthen Central control over the States more and more. While the federal system, by its nature, has generated State consciousness more than under the British regime, the Centre has been endeavouring more and more to assume control over the States not only by Constitutional amendment (Chap. 5, *ante*) and legislation but also by setting up extra-Constitutional bodies like the Planning Commission,[5] the National Development Council,[6] and numerous Conferences. As regards the predominant position of the Planning Commission, a learned author[7]observed—

> "The emergence of the Planning Commission as a super-government has disturbed the concept of the autonomy of the States. It has also impinged on the authority of the States in matters vital to its administration such as education, health and other welfare services."[7]

The Government have, since July, 1967, reorganised the Planning Commission,[8] with changes in its status and functions (as recommended by the Administrative Reforms Commission), constituted by whole-time members (and headed by the Prime Minister,[5] as before), as a result of which the Commission will cease to have any executive functions and will confine itself to the formulation of plans and the evaluation of their performance.

No less momentous is the increasing dependence of the States upon the Union in the matter of finance. Not only is the financial strength of a State dependent upon the share of the taxes and grants-in-aid as may be allotted to it by the union upon the recommendations of the Finance Commission, there is a general sense of irresponsibility in financial matters in the States founded upon the assumption that the Union will ultimately come to its aid or, else, the National Plan will fail.

But, notwithstanding this unitary trend, federation has not yet proved to be a failure in India, particularly because the Supreme Court has steadfastly enforced the distribution of powers laid down in the Constitution,[9] without acknowledging any pre-eminence of the Union so as to obliterate that federal distribution, except in solitary instances so far.[10]

The trend towards greater cohesion is, in fact, an index not of the failure but of the success of the federal system of India. One of the defects of a federation, according to classical writers, is its weakness. Credit must go to India if she succeeds in attaining unitary strength upon the foundation of a federal governmental system over an unwieldy territory inhabited by heterogeneous elements with radically conflicting ideologies. The founders of *our* Constitution had realised that a federal system was the only system suitable to a country like ours, consisting of so many heterogeneous elements. But, in view of our external dangers, existing and potential, they sought to impart into the federal system the elements of adjustment by resorting to which the system might acquire the strength of a unitary system in case of external aggression or other extraordinary circumstances. That it has **succeeded in attaining this objective**[11] has been demonstrated by the working of our governmental system since the ominous aggression which had been set in motion by China in October, 1962 and is still being driven hard by the China-Pakistan axis, even after the debacle of Yahya Khan's Army in Bangladesh in 1971.[12] The situation on India's borders was made more serious and alarming by subsequent events such as the fall of the friendly government of Mujibur Rehman in Bangladesh,[12] the importation of Soviet Forces in Afghanistan together with the countervailing move of the United States to arm Pakistan with the most sophisticated weapons which could very well be used against India, as had happened in the past; and at the back of all this, loomed the nightmare of the 'Islamic bomb', backed by American bases within Pakistan.[13]

Separatist forces at work.

IV. Unfortunate happenings in the Punjab, Kashmir and Assam have demonstrated that strong Central control is needed in India if not only federalism but the very existence of the Union of India is to be saved from separatist forces fighting for fragmentation and aggressive provincialism, which, if undeterred, would undermine that national unity and integrity which forms the foundation-stone of the Constitution.

The sikhs.

A. So far as the Sikh demand[14] was concerned, it would have, if acceded to, put an end to the federal Constitution and was bound to raise similar demands from other States and minority communities,[15] leading to the break-up of India as a nation. Though Anandpur Saheb resolution,[16] which the Akalis intended to impose upon the Union by force[17] did not itself speak of secession from the Union or to start an independent State of Khalisthan that was at the back of the movement, as evidenced by extraneous evidence.[18] Apart from that, the demand that, after the formation of a compact State with adjoining Sikh majority territories, the Union would have jurisdiction over that State only with respect to five subjects, *viz.,* Defence, External Affairs, Posts and Telegraphs, Currency and Railway, put their case even higher than that of Jammu & Kashmir. For, while practically the whole of the Union List (List I of the 7th Schedule to the Constitution) and a good number of items of the Concurrent List (List III) now extend to the State of Jammu & Kashmir, the Anandpur resolution would have ousted the jurisdiction of the Union over the entire Concurrent List, and a substantial portion of the Union List, *e.g.,* those relating to communications other than Railways, Posts and Telegraphs, Banking, Insurance, Public Debt of the Union, Reserve Bank of India, Trade and Commerce with foreign countries, regulation of national industries, inter-State waterways, institutions of higher education, Elections to Parliament, Supreme Court and High Courts, Union taxation, and the like. The Akalis could not claim inspiration from the instance of Jammu & Kashmir, because while the latter State has a history of its own, with international implications, Punjab had all along been an integral Province of India and, further, the Akalis did not constitute the entire Sikh population of Punjab,—the other Sikhs did not support the Akali demand; nay, they failed to win over the Sikh President of India or even the Sikh Chief Minister of the State of Punjab. On the other hand, within the Akali Party, sprang up several leaders and in May, 1985, the leaders gave way to terrorists, led by the father of the Khalistan demand, Sant Bhindranwale.[19]

Subsequent to the preceding events in July, 1985 (after the accession of Sri Rajiv Gandhi as Prime Minister), a momentous event took place, namely, that an agreement (called the 'Punjab Accord')[20] was entered into between the Prime Minister of India and Sant Longowal,—the head of the predominant group amongst the Akalis. According to this Accord, *inter alia,* the Anandpur Resolution was to be referred to the Sarkaria Commission and some Hindi-speaking areas of Punjab were to be transferred to Haryana in lieu of Chandigarh which would come over to Punjab from Haryana.

The Punjab Accord, however, failed to make any settlement of the Punjab problem (upto July, 1992) for the following reasons—

(a) The Chief Minister (Surjeet Singh Barnala) failed to submit the State Government's case to the Sarkaria Commission.

(b) The Commission appointed to find out the Hindi-speaking areas of Punjab which were to be given over to Haryana in lieu of Chandigarh failed to complete its work owing to repeated objections of various sorts being raised by the Punjab Government.

(c) The Mann Group, elected to Parliament in November, 1989, raised new demands every day thus deferring any amicable settlement with the National Front Government which was ready for a talk.

(d) Terrorism was continuing unabated and each morning's newspaper reports some dozen murders, bank loot, and the like.[21]

In deference to the opposition to any further extension of President's Rule (which had been imposed in 1987), election was held in Punjab in February, 1992, at which Congress (I) formed Government with Mr. Beant Singh as the Chief Minister. It seemed that as a result of unabated Police action in Punjab, the terrorists had left Punjab but dispersed throughout India, from Uttar Pradesh to Andhra Pradesh, West Bengal.

The Assamese.

B. The case of the agitators in Assam is peculiar. They do not demand secession, but they want 'Assam for Assamese'.[22] Though at the beginning, their demand was mystified by the intervention of political parties, the massacre of hundreds of Bengalis,—Hindus and Muslims,—developments since January, 1983 leave no doubt that the agitators are determined to purge Assam of all people who are not of Assamese origin. These non-Assamese, however, consist of different categories:

(a) In so far as the *citizens* of other States, such as West Bengal or Bihar, are concerned, who have settled in Assam for purposes of profession or business, the agitators must remember that these citizens of India have a fundamental right to reside and settle in 'any part of the territory of India', under Art. 19(1)(e). To oust them from the State of Assam by violence would be to give a decent burial to the Constitution, and if Assam is allowed to succeed, other States would most likely follow, breaking federal India into pieces.

The first task of the Government and the agitators should, therefore, be to identify these 'citizens of India', *i.e.,* those who have acquired citizenship of India under Art. 5 or 6 of the Constitution or under the provisions of the Citizenship Act, 1955. These people are not 'foreign nationals'. They can be found out only through some peaceful machinery and not force.[23-24]

(b) On the other hand, there are illegal immigrants from Bangladesh (erstwhile East Pakistan); they are, in fact, 'foreign nationals'. The

Government of India, however, contends that it has got its obligations under an international agreement, so that they cannot be driven back to Bangladesh; but even then, the Government of India can raise the problem with Bangladesh diplomatically or before some international forum, the details of which cannot be discussed in this book. The humanitarian ground raised by the Government of India in favour of the illegal immigrants condemns the Government itself for its dilatory policy. Even apart from Assam, lacs of Muslim immigrants and the 'long marchers' from Bangladesh are constantly infiltrating into West Bengal and are being sheltered by the Muslims in the bordering territories of West Bengal, and in course of a few years or even months, their case to remain in West Bengal will be ripened by the evidence of ration cards, electoral roll, etc.,[25] in the same manner as in Assam, if years pass on without any firm action being taken against such infiltration from another 'foreign' State,—as would never be tolerated (at such mass scale) by any independent State (other than India) in the world.

The problem of infiltration from Bangladesh.

Not only the security of India but the entire social and political structure of India has been threatened by the mass infiltration of Bangladeshis into the border States of Assam and West Bengal.

The question involved is not communal but legal, namely that of sovereignty. No independent State, other than India, would welcome infiltrators from another State. As early as 1964-65, cases brought before the Calcutta High Court clearly demonstrated that large number of immigrants had overstayed after expiry of their visas, with the support of their kinsmen or friends in the bordering districts of West Bengal. In pursuance of the judgments passed in these cases, the Police pushed back many of these immigrants into Bangladesh, but the operation was stalled by the utterance of a Chief Minister of Bengal that he himself was neither a Hindu nor a Muslim, and that he would view the problem of illegal immigration or infiltration as a *humanitarian* problem caused by a shortage of food or employment in Bangladesh.[26]

The Government of India also shut their eyes to the problem even when some leaders in Bangladesh threatened to conduct a 'long march' of Pakistani nationals through India or even when the infiltrants demanded Indian citizenship at a mammoth gathering at the Calcutta Press Club under the nose of the Police.[27] They were roused to their senses only when the infiltrators reached the capital city of Delhi (as did Bahadur Shah Zafar!), and when they are demanding Indian citizenship on the strength of their Ration Cards and entries in the electoral roll,[28] and forming Muslim pockets[29] which would lead to a demand for their autonomy.

It is a pity that the same Central Government who had earlier overlooked the illegal immigration as a human problem has now held it to be a serious threat to the integrity of India[29] at a conference of Chief Ministers called by the Centre, and the same Party in West Bengal which had so long prized the votes of the infiltrators,[29] has made a clean breast of the *modus operandi* adopted and the seriousness of the problems created by them.[29]

Apart from anything else, infiltration has thus come to operate as a divisive force threatening the integrity of India, which can be rooted only by firmly carrying out a plan of action after realising the gravity of the situation, instead of using the illegal infiltrants as pawns in the game of vote-hunting.

Language as a separatist force.

Another such division factor is that the people having a separate language must have a separate political status and autonomy. The initial blunder of the Government in this behalf was committed when the States were reorganised on a primarily linguistic basis and that current is still unimpeded, thus raising the original number of States in Parts A-B (18) to 28, in 2000, and the scramble for *Gorkhaland, Bodoland, Jharkhand, Uttarkhand* and the like is continuing at different levels[30] [Jharkhand and Uttaranchal (Uttarakhand) have been created as new States by carving their territories out of the territories of the Bihar and the Uttar Pradesh in 2000. Besides Chhattisgarh, as a new State, has been created by carving it out of the territory of Madhya Pradesh in 2000. (see Table III)]. To concede any form of separate status, such as the formation of a Union Territory, ultimately leads to the demand for full-fledged Statehood.

A formidable corollary from the linguistic demand is the struggle for getting one's language included in the 8th Schedule of the Constitution. Obviously, there is little material gain from such inclusion. The only two relevant provisions of the Constitution are Arts. 344(1) and 351. The former gives the people representing a language specified in the 8th Schedule to have a member in the Official Language Commission and the latter gives that language to be considered for contribution towards the development of the Hindi language. The real motive behind the struggle for inclusion of a particular language, therefore, is *political,* namely, to lay the corner-stone for demanding a separate political entity for the people speaking that language, as in the case of Gorkhaland.[30] Be that as it may, the demand for every language to be included in the 8th Schedule is wild because there are as many as 1652 languages in India (*vide* Table I). Hence, there must be standard according to which the status of the 8th Schedule may be conferred on a language. Unfortunately, there is no such standard laid down in the Constitution itself and that is opening an avenue for diverse factions to raise demands which, if conceded, would lead to a suicidal fragmentation of the Union. Outside the Constitution, of course, there is an understanding that only languages which are spoken by over one lakh of people are entitled to enter into the 8th Schedule (Table I). But this understanding is too feeble to resist indiscriminate claims from any faction which may gather force enough to intimidate the Government.

It is lamentable that notwithstanding the foregoing warning offered by the Author in the 13th Edition of his *Introduction to the Constitution of India,* Government of India failed to amend the Constitution to lay down any definite standard for inclusion in the 8th Sch. and, instead, they have been obliged to amend the 8th Sch. itself[31] to include three new languages, *viz., Konkani, Manipuri* and *Nepali,* because of the time being, their demand became irresistible. But even then the case for the elevation of other languages continues unabated. Curiously, Mr. Ghising is not contented with the inclusion of Nepali alone; he wants additional entry for *Gorkhali,* contending that it is a language separate from Nepali which is for all residents of Nepal, apart from the Gorkhas.

A more striking event is the formation of a new Party styled *All-India Urdu Morcha,*[32] with the manifesto that if they are returned at the ensuing election they would instal Urdu as the *second* Official Language. Mere inclusion of Urdu in the 8th Sch. is not enough for them. This illustrates the political significance of the language agitation as a separatist force.

Financial inadequacy in States.

As to the working of the federal system, there is very little doubt that the allocation of the financial resources to the States by the Constitution of 1949 has proved to be cramping for carrying out the legitimate functions of the States, however narrow they might be. After the general election in 1980, the party in power at the centre was not in control of all the States. Different parties subscribing to different ideologies are in power in various states; these parties have been demanding revision of financial provisions of the Constitution. The Union shall have to sit with the States politically, to ascertain how much of revision of the financial provisions would satisfy the demands of the States which seek greater autonomy,[33] consonant with national security, and then to implement the findings, so that the unity and strength of the Nation may not be undermined by the Union-State carriage being driven to two opposite directions. In such a situation prudence is called for on the part of both the Union and the States. Either party must not forget that the basis of a federal system is the maintenance of what *Dicey* called the 'federal sentiment'. To be precise, the Government of India must realise that they cannot do without the States and that the strength of India lies in the strength of the border States, in particular. On the other hand, West Bengal or Jammu & Kashmir can hardly forget that they cannot maintain their political entity without the protection of the Union against powerful foreign aggression. It is suicidal for federalism if the States ruled by Opposition Parties consider the Union Government as their foe or 'rival'[34] and go on carrying on a campaign of vilification. Nevertheless, there is much truth in the contention of these States that their so-called autonomy would be hollow without a larger financial freedom. A revision[34] of the provisions of the Constitution relating to this matter should be undertaken as soon as the Government gathers the strength to carry such vital amendment of the Constitution.

What is more important is that there should be a greater emphasis on consultation with and consent of the States in areas affecting them vitally but not affecting the integrity of the Union, so as to establish a truly 'co-operative federalism' in India.

Judicial Review.

V. The most remarkable achievement in post-Constitution India is the exercise of the power of judicial review by the superior Courts. So long as this power is wielded by the Courts effectively and fearlessly, democracy will remain ensured in India and, with all its shortcomings, the Constitution will survive. The numerous applications for the constitutional writs before the High Courts and the Supreme Court and their results testify to the establishment in India of 'limited Government', or, 'the Government of laws, not of men', as they call it in the United States of America. The Supreme Court has well performed its task of protecting the rights of the individual against the Executive, against oppressive legislation and even against the Legislature itself, when it becomes over-zealous in asserting its privileges not only against the individual but even against the Judges.[35]

At the same time, it should be observed that neither the guarantee of Fundamental Rights nor its adjunct,—Judicial Review,—could have full play during the first quarter of a century of the working of *our* Constitution owing to their erosion by Proclamations of Emergency over a substantial period of time.

The period of 15 years, when Arts. 14, 19, 21 and 22 remained suspended owing to the operation of Art. 358 and of Orders under Art. 359, can hardly be overlooked. It is true that the Emergency provisions are as much a part of the Constitution of India as any other, and that history has proved the need for such powers to meet extraordinary situations, but, broadly speaking, if the application of the Emergency provisions overshadows the other features of the Constitution, the balance between the 'normal' and the 'emergency' provisions is palpably destroyed. Of course, the Janata Government has hemmed in the Emergency provisions in Arts. 352 and 356, by giving a larger control to Parliament over the exercise of such power, under the 44th Amendment Act, 1978. Nevertheless, even apart from Emergency, there has been an astounding erosion of Fundamental Rights owing to multiple amendments of the Constitution.

As I pointed out in the previous Editions, the means to prevent any such conflict between competing interests is to process all proposals for constitutional amendment through an expert and objective machinery, which would ensure the progressive adaptation of the Constitution to the Copernican changes in the social, economic and political background, apart from the views of the political supporters of the Party in power and the bureaucrats.[36] This purpose would not be served by Sarkaria Commission, which was confined to 'Centre-State Relations'.

A case for revision of the Constitution.

It can be served only by setting up a Commission for the comprehensive revision of the Constitution which has also been mutilated by multiple amendments during more than half century of its working, as mentioned at the outset of this Chapter. Any piecemeal reference to the existing Law Commission, with respect to particular provisions of the Constitution will only aggravate the anomaly.

The role of the judiciary under our Constitution.

Even though the power of formal amendment has been conferred upon Parliament by Art. 368 of the Constitution and the scope of resorting to the Judiciary to introduce changes has been reduced by making the process of amendment easier than in the U.S.A., the working of *our* Constitution has opened the avenue for judicial review in India in nearly the same way as in the U.S.A.

Paradoxically, the urge for judicial intervention has arisen from the very tendency of the Legislature to make frequent amendments to the Constitution, which were eating into the vitals of the Constitution (which the Supreme Court called its 'basic features'). Hence, asserted the Court, it could set aside even an Act to amend the Constitution, not only on (i) a *procedural* ground, *viz.*, that the procedure laid down in Art. 368 has not been complied by the relevant Bill, but on (ii) the *substantive* ground, *viz.*, that the amending Act has violated one or other of the basic features of the Constitution.[37]

Conversely, it has come to be held that if the Legislature is not prompt enough to implement the provisions of the Constitution, the Court has the duty to make the changes necessary to adopt the demands of a progressive society.[38] In this mission, the Court has propounded two doctrines—

(a) The Court is the exclusive and final interpreter of all provisions of the Constitution.[37]

(b) The Court has the duty to make the ideals enshrined in the Constitution a reality,[39] and to meet the needs of social change in a welfare society.[38]

(c) This duty would extend even to the implementation of the 'Directive Principles' in Part IV, which were 'not enforceable by any Court' according to the Constitution itself [Art. 37].[40]

Novel trends in Judicial Review: Judicial activism.

If a rose has its thorns, so must Judicial Review—the flower of Indian constitutionalism,—has its thorns, as has been demonstrated by the fact that, during the last decade *our* Supreme Court has been evolving novel doctrines, such as that of 'basic structure' or 'basic features' or 'prospective overruling' 'unenumerated' fundamental rights,—the foundation for which is not apparent on the face of the Constitution. In the present context, suffice it to point out that if this trend is not curbed, it would lead to unwholesome consequences, however well-intentioned the authors of such judicial innovations might be; for instance—

(a) It would add to the confusion and uncertainty, which has been introduced by the multiple amendments made by the Legislature, to the dismay not only of the general public but also of the administrators and the courts themselves, in applying the written Constitution,—the very object of which is to infuse certainty and order into the political system.

(b) It would engender bitterness between the Legislature and the Judiciary, if either of them seeks to checkmate the other,[41]—by means of amendment or judicial activism.

(c) There is no knowing how far such novel doctrines may be extended, for, the final say, in the matter, rests with the Supreme Court itself. The result would be an amendment of the Constitution by the Judiciary, while Art. 368 of the Constitution specifically places the power of amendment in the legislative machinery.[42]

Dangerous anti-national trends in minority demands.

VI. The present Chapter would be incomplete without recounting the ominous trends which have been revealed since the General Election of 1980 as regards the ever-aggressive demands of the religious minorities—which run counter to the very foundations of the existing Constitution and which seek to ride roughshod over the pronouncements of the highest tribunal of the land,— not only on the ground that they are inconsistent with the provisions of the Constitution but because they are not consonant with the separatist ambitions of the religious minorities. the most grievous feature of this post-Independence development is that the Minorities have held up their vote as a bait and political leaders of the majority community *belonging to different parties* have indiscriminately swallowed that bait in their Election Manifestos and alliances, irrespective of the *ideologies* which ushered in the Independence of India and which form the bed-rock of the existing Constitution. In this background, it is the duty of an impartial academician to point out to a nationalist Indian (every Indian citizen cannot be assumed to have narrow political ambitions) that to accept such anti-nationalist demands of the Minorities (which, though sponsored by the Muslims, are being reiterated by the other minorities, such as the Christians, the Sikhs, the Buddhists, in so far as such demands would serve their respective communal or sectional interests) would be to tear India into pieces, with a second Pakistan for Muslim-majority areas[43] or a Christendom for the Christians;[44] or, an Islamic Republic[43] for the Muslims, or a Khalistan, so far as the Sikhs are concerned, or a Buddhist Republic so far as the Buddhists are concerned, and so on.

It is a matter of regret and concern that the manifestos of Congress (I) and the Janata Dal for the 1991 elections promised reservations for the minorities in government service and the Armed forces. The formation of Muslim Majority districts in Kerala and Bihar is another step furthering separatism.

Space would not permit a full treatment of all the demands hoisted by the religious minorities and for a fuller treatment, the reader should read the Author's *Commentary on the Constitution of India,* 6th Ed., Volume D, pp. 217-28; 232-37, where, though published early in 1978, these dangerous minority ideologies had been anticipated. The broader propositions involved may, however, be mentioned for the consideration of the average reader :

A. The major demand of the Muslim minority community now is for a proportional representation in the Legislatures and in the Services, according to their number.[45]

This is, in fact, a resurrection of that baneful plant of the 'communal award' which had been inserted into the Indian body politic by the British Prime Minister Ramsay MacDonald and which had its inevitable culmination in the bloody Partition of India.

It is to prevent any repetition of such anti-national cleavages that the framers of the Constitution of free India proclaimed the Unity of the Nation to be the objective, in its Preamble, abolishing any reservation or representation on the basis of the religious colour of any individual or community; and such reservation, if made now, would violate the guarantee of equality in Arts. 15(1) and 16(1)-(2), as explained by the Supreme Court.[46-47] Of course, all these guarantees acknowledge the constitutionality of reservation or other special provisions in the interests of the 'backward classes', so that any community which is *socially or educationally* backward may be entitled to special consideration under the existing Constitution [*Art.* 15(4)], irrespective of its religious complexion. But that would not satisfy the Muslim or Christian minorities today. They want reservation for a man because he is a Muslim or a Christian, even if he be affluent; but to make any special provision for such a person would be a discrimination *against the majority*—violating the rights of equality guaranteed by Arts. 15-16.

To accede to these patently anti-national demands would need multiple amendments of the Constitution involving a decent burial of the doctrines of equality which the Supreme Court has built up[46] during nearly more than half a century, and to re-instal the monster of communal representation[47] which was banished from this land by the fathers of the Constitution.

B. Another demand of a minority community is that the Minority Commission, set up administratively, during the Desai regime, should be given a constitutional footing and a *binding force* to its recommendations.[45]

Apart from the fact that none of the various investigatory Commissions set up by the existing Constitution has got more than recommendatory status, the broad consideration against any such drastic proposal is that, if conceded, it would mean a government by the Minority Commission, resulting in the abdication of the government by the peoples' representatives voted to power. To quote the words of Sir Samuel Hoare, who rejected the suggestion that the recommendation of the Public Service Commission should be binding on the Government (see Chap. 30, *ante*)—

> "The danger is that if you give them mandatory powers you then set up two governments."

Besides, what would happen if the members of the Minority Commission (which must necessarily be a collegiate body representing the various minority communities) fail to agree (as has already happened since one of the Members of an erstwhile Commission, Prof. John, in a reasoned discourse, exposed the blatantly unreasonable, anti-national and anti-majority views and outlook of some of his colleagues)?[48] When the Commission is divided, it is obvious that Government must have the discretion to find out which of its views is consonant with reason and national interests. Even when the Minority Commission speaks in one voice, it cannot claim an imperative command simply because it is *not a body responsible to the people*.

Besides, what should be the proper jurisdiction of the Minority Commission, what would happen to any recommendation of the Commission which is *ultra vires* or outside that jurisdiction and who will decide whether any of its recommendations is beyond its jurisdiction? Insurmountable confusion and chaos would result if, in spite of these considerations, binding force is given to the recommendations of the Minority Commission.

The only proper jurisdiction of any such Commission, under the existing Constitution, would be the matters included in Arts. 25-30.[49]

It is to be noted that Parliament has enacted the National Commission for Minorities Act on 17 May, 1992, but that its recommendations [*s.* 9(1)(*c*), (2)-(3)], have *not* been given any obligatory force. The Act defines "minority" as a community notified as such by the Central Government.[50]

C. Another demand advanced on behalf of the Muslims is that the Directive in Art. 44 for establishing "a uniform civil code throughout the territory of India" should not be applicable to the Muslims who should be allowed to be governed by the *Shariat* as their personal law.[51]

This demand, again, seeks to put the clock back. At the time when the Constitution was framed, all such claims were considered and rejected on the grounds that (a) matters like marriage, inheritance and the like falling under the category of 'personal law' are secular matters having no essential relation to religion[52] and that (b) without a common civil code, inter alia, the people of India, belonging to heterogeneous elements, could never be united into a nation. The provision in Art. 44 is nothing but an implementation of the objective of 'fraternity, unity and integrity of the Nation' which is not only enshrined in the Preamble to the Constitution, but is since buttressed by the Fundamental Duties in Art. 51A(c), (e) [see *Chap.* 8].

It may be mentioned that when the Law Commission of India took up the question of framing a common code of marriage and divorce, not only the Muslims but the Christians too opposed the move and that the very government which had induced the Hindus to give up their scriptural laws relating to these matters, gave way to the Minority resistance, for 'political' reasons. Now that Art. 51A has been embodied in the Constitution, a constitutional lawyer might urge that any opposition to Art. 44 by any member of any minority community would be a violation of Art. 51A, and any Government which yields thereto would be a party to such violation of the Constitution.[53]

It is curious that while polygamy has been either abolished or controlled by Islamic States like Turkey and Bangladesh and is discouraged even in Pakistan, Indian Muslims are pressing to uphold it as their religious right, founded on the *Shariat*[54] and eventually protected as a fundamental right, by the Constitution of India.[55]

As against this, the Government of India, in 1986, undertook legislation[55] to supersede the law declared by the Supreme Court in *Shah Bano's* case[56] and deprived the Muslim women of the rights that they enjoyed in common with all other women. Such legislation retards the unity of the Nation as envisaged in the Preamble to the Constitution and at the same time, relegated India to a backward status even in the progressive Muslim world.

Notwithstanding all this, the Law Minister of the National Front Government is reported to have declared that a common Civil Code could be adopted 'only when the members of the minority communities demanded it'.[57] One wonders whether anybody has the authority to infuse these words into Art. 44 of the Constitution, without an amendment thereof. It would be useful to write on the walls of Parliament the text of Art. 44—

> "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

D. Once one particular community is permitted to urge anti-national demands, it is natural that *other* minority communities will start clamouring for other privileges which might serve their own sectional interests.[53] The claim of Harijans who have embraced Buddhism to be still treated as "Scheduled Castes" for being entitled to the special reservations for Scheduled Castes in Parts III and XVI notwithstanding conversion to a religion other than Hinduism, may be cited as an instance (since conceded in 1990).[53, 58]

Claim of Hindu converts to other religions.

An impartial observer should wonder how such claim could be advanced by the Buddhist, Muslim or Christian converts in the face of the history and meaning of the very expression 'Scheduled Castes'. It is, in the first instance to be recalled that this expression is not a coinage of the Constitution of Independent India, but had its origin in Para 2 of the Scheduled Castes Order, 1936, which had been issued in pursuance of the direction in Para 26 of Sch. I of the Government of India Act, 1935—to determine the classes who were 'depressed classes' (called 'harijans' by Mahatma Gandhi). In this pre-Constitution Schedule Castes Order of 1936, it was categorically declared that *no* person who is an 'Indian Christian' or who professes 'Buddhism' or a 'tribal religion' should be regarded as a member of a Scheduled Caste even though he might originally have belonged to the list of Scheduled Castes prescribed by that Order. It does not appear that any Anglo-Indian or Buddhist ever protested against this provision of the Order of 1936.

The framers of the Constitution made two categories for favourable treatment—(a) Scheduled Castes, and (b) 'socially and educationally backward classes' even though they might not belong to any of the listed Scheduled Castes [*Art.* 15(4)]. The reason why the separate category of 'Scheduled Castes' was still maintained was that the caste system was prevalent only amongst Hindus and the Sikhs, owing to their social history, and it was this caste system which resulted in their degradation. *Casteism is not professed by other religions, such as Christianity, Buddhism and Islam.*[53, 58] That is particularly the reason why the makers of the Government of India Act, 1935 and the Orders thereunder did not entertain any reservation in favour of Hindu converts to those religions.

In the Scheduled Castes Order, 1950, which has been framed under the Constitution, it is, accordingly, laid down (para 3) that a person shall *not* be deemed to be a Scheduled Caste "if he professes a religion different from the Hindu or Sikh religion". The validity of this exclusion was challenged by persons converted to Buddhism under the auspices of Dr. Ambedkar, but it was rejected by a unanimous decision of the Constitution Bench of the Supreme Court.[58] It is patent truth that the Hindus form the target of conversion by proselytising religions, such as Christianity, Islam or Buddhism. Their object is to *overturn* the aforesaid decision of the Supreme Court. If any Government entertains softness to concede the demands of the converts from Hinduism, they would be abettors of conversion from one religion to another and an act of aggression against the non-proselytising Hindu religion,—quite contrary to the guarantee of secularism in Art. 25 of the Constitution.[58]

Of course, if any section of converts comes under the 'socially and educationally backward' classes,[59] they would still be entitled to the special privileges under Arts. 15(4), 16(4). But that would be a different matter.[58]

The Constitution (Scheduled Castes) Orders (Amendment) Act, 1990 has, however, extended the reservations to converts to Buddhism also. This will further erode the unity of the nation. In fact, the Christian converts from Hinduism are agitating for similar reservation.[60]

The advocates of guaranteeing further minority rights in India, supplanting the existing Constitution, if necessary, pretend to overlook the following broad considerations which distinguish the status of minorities in India from the international problem of minorities in post-War Europe which have inspired the International movement for minority safeguards:

No minority problem in India, in the international sense.[61]

(a) In the international sphere, the demand for special safeguards to protect the cultural or linguistic identity of minority communities has emerged from the principle that owing to war or like circumstances causing territorial changes *without the consent* of the people residing in those territories, the identity of such communities who have been torn asunder by circumstances beyond their control should be preserved from ethnic extinction, by affording proper safeguards through international Charters and national Constitutions.

The partition of India which left a portion of the Muslim community in India took place in the *opposite* way. The pre-independence demand of the Muslim community led by their acknowledged leader, Mr. Jinnah, was to have a separate homeland for the Muslims who, it was asserted, constituted a nation separate from the Hindus. The British Rulers conceded to this demand overruling the contention of the nationalist Indians that the Muslims and Hindus as well as the other people residing in India constituted one Nation and not two or more. The result of the acceptance of the two-nation theory was the lamentable partition of India and the creation of a separate Dominion, named Pakistan. As a sequel of such division, the Hindu leaders in India could have insisted upon an exchange of population between Pakistan and India, so that all the Muslims in undivided India could be transferred to Pakistan. But they did not prevent any Muslim from staying behind in India, *as an Indian.* Those who remained in India, did so *of their free will and option.* The partition was the seeking of their own community and *not the result of any circumstances beyond their control,* such as the First or Second World War which created the international minority problem in the world.

Of course, in consonance with the liberal attitude of the Hindu leaders, the framers of the Constitution of independent India embodied certain safeguards for minorities in like manner as the International Charters. But these safeguards were extended to all numerical minorities of all religions, languages and cultures and not to the Muslims in particular. The Muslims who opted not to go to Pakistan did so with their *eyes open* as to the safeguards they might get under the draft Constitution and not because of any covenant that they would be allowed *to demand more and more to serve their sectional interests.*

It is to be noted that the Universal Declaration did not contain any provision in respect of minorities so that the makers of the Indian Constitution had no international obligation to include in the Constitution of 1949 any special provisions to protect the minorities. Subsequent thereto, in 1966, the International Covenant was adopted, including Art. 27[46] as follows:

> "**Article 27**. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

Few people appreciate that these rights were anticipated by the makers of the Indian Constitution of 1949 and guaranteed them as the fundamental rights of the minorities in Arts. 25, 29, 30.

But to urge for *political* or other rights not provided for by the Constitution, would be not only unconstitutional but anti-national, because the makers of the Constitution wanted to build up *one* Nation, namely, Indian, in which persons belonging to the majority and the minority would embrace themselves into a Fraternity [Preamble]. To refuse to enter into the mainstream of Indian Fraternity on the plea of Muslim identity is nothing but a vestige of the two-Nation theory which the fathers of the Indian Constitution sought to banish once for all as a result of their bitter experience culminating in the lamentable Partition.[47] To reiterate: the advocates of the two-Nation theory went away to the 'homeland' for the Muslim community of their *own choice*. Some of them, however, stayed behind in India as their birth-place. After several decades of enjoying the special privileges of minorities under the Indian Constitution, they now refuse the embrace of Fraternity which the Preamble of that Constitution accords and seek to demolish the 'integrity' of the Indian Nation, by asserting that they are 'Muslim Indians'.

Pleading for them, one ex-Magistrate asserts that the Muslims remaining in India have made India "the largest *Islamic nation* in the world after Indonesia" [Article by Buch in the *Statesman*, dated 12-12-1990].[61]

(b) In the international sphere, it has been emphatically made clear[62] that the only object of offering the minority safeguards was to protect the minority from discrimination by the majority who administer a country under a representative system of democracy. But this is on the condition that the minority "must be loyal to the State of which they are nationals",[62] and must not set up an 'imperium in imperio' founded on their minority status.

The framers of the Indian Constitution, too, fondly believed that, having established a secular State (*i.e.*, a State which has no established religion of its own, and treats all religions equally) and offered safeguards for the preservation of the religious, cultural and linguistic identity of the minorities,—not only Muslims, but all the minorities who remained in India as Indian citizens, would be united as one Nation by the bond of 'fraternity' (Preamble). But this the Muslim community, in particular, has refused to achieve. Their demand is not only to create a homeland[63] for Muslims *within* India in the same process as led to the creation of the separate State of Pakistan, but even to supplant it by an Islamic State,[64] if possible. Only the other day, a responsible Muslim dignitary is reported to have said—"We are Muslims first and Indians afterwards . . *Muslim culture is the mainstream in India and others must join it.*"[65] This is a resurrection of the two-Nation theory which led to the lamentable Partition of India which must be resisted by every nationalist Indian, irrespective of his party affiliation.

A student of the Indian Constitution can only wonder, with bewilderment, whether any such assertion runs afoul of the following provisions of the Indian Constitution[66]—the Preamble; Art. 19(2), as amended by the 16th Constitution Amendment Act, 1963; Art. 51A(c),(e) [duty to promote 'common brotherhood amongst all the people of India *transcending religious. . .*or *sectional diversities'*], and whether this was the desideratum for which the nationalists in India consented to give up a part of their motherland in order to gain independence.[67]

Disrespect for the Motherland.

(c) I must, with profound regret, point out that there are Muslims, who are not even willing to call India their 'motherland', on the ground that Bankim Chandra's *Vande Mataram,* which was adopted by the 1896-session of the Indian National Congress, seeks to deify the motherland, while any kind of imputation of personality to God smacks of idolatry, as condemned by Islam. On this point, the reader may at once refer to p. 18 of *India, 1987,* where the translation of the first stanza of this song (by Sri Aurobindo) has been reproduced. To express gratitude to the soil from which you sprang and which sustains you with milk and honey every moment of your life is not idolatry, simply because it is called 'mother'.[68] In fact, the country of one's origin can only be described either as 'fatherland' or as 'motherland'. Since some political leaders who are not themselves Muslims, sometimes fan communal sentiments only to gain political favours from the minority community, it would be worthwhile to reproduce relevant provisions from the Constitutions of Russia and China, both of which have a considerable Muslim population who are obliged to swear by these provisions, without demur.

Article 62 of the 1977 Constitution of the U.S.S.R. says—

> "Defence of the Socialist Motherland is the sacred duty of every citizen of the USSR. Betrayal of the Motherland is the gravest of crimes against the people."

The 1993-Constitution of the Russian Federation says—

> "Art. 59.1.—The protection of the *fatherland* is the duty and obligation of the Russian Federation."

Article 55 of the 1982-Constitution of the Chinese Republic repeats, in no less emphatic terms:

> "It is the sacred duty of every citizen to defend the *motherland* and resist aggression."

It would be pertinent, in this context, to mention that the erstwhile ruling Party in Turkey was named the 'Motherland Party'.

Any sane man must concede that what is not anti-Islamic elsewhere cannot be anti-Islamic in India simply because the Muslim vote is covetable to every party which seeks to come to power.

The reason why the song *Vande Mataram* was adopted as complementary to the National Anthem *Jana-Gana Mana* may be explained in the words of the President of the Constituent Assembly, on the 24th January, 1950, which were adopted with applause:

> "The composition consisting of the words and music known as Jana Gana Mana is the National Anthem of India, subject to such alterations in the words as the

> Government may authorise as occasion arises; and the song Vande Matram, which has played a historic part in the struggle for Indian freedom, shall be honoured equally with Jana Gana Mana and shall have equal status with it."

To resist the play of the *tune* of this song on the ground that it would impair communal harmony because it is an emblem of idolatry which is repugnant to Islam, is to forget the following facts:

(a) That it was sung in the 1896-session of the Indian National Congress, after omitting the larger part of the song which depicted the hands and limbs of the motherland (in order to obviate any objection from the Muslims) and retaining only some 20 words at the beginning of the song, for official use.

(b) That it is that trimmed composition which is printed at p. 18 of India, 1988-89, as the counterpart of the National Anthem.

(c) That the tune of that clipped composition that is played in the All India Radio and the T.V. at the beginning of each day's programme.

(d) That whatever might be the objection to particular words used in the latter portion of the song, the same cannot be raised as an objection to the *music* representating the earlier part of the composition, except by a handful of men who have forgotten that what they could do during the days of the Muslim League cannot be done today *because of the partition of India intervening.*

(e) That this music is an emblem not of communalism but of India's freedom.

(f) To protest against it today is to turn the table up-side down, taking recourse to religious fanaticism.[69]

Lack of national sentiment.

There is little doubt that this country, inhabited by heterogeneous elements belonging to different races and religions, can maintain her independence, only if she stands as one man, inspired by a national sentiment. Every American, whether of English, Hebrew, Italian or Negro origin, regards the United States as his motherland for which he must fight against dangers at home or abroad, and that is why she has maintained her independence as a mighty Nation, notwithstanding so much of difference in race, religion and culture amongst her variegated population. The situation in India is just to the contrary. As in other matters, in India, even constitutional and legal questions are muddled up with politics, which, of course, means *power politics.* Few leaders today think of the Nation (as did the members of the First National Congress of 1885), apart from the interests of the political parties to which they belong and through which machine they scramble their way to the seat of power. It is even risky for an impartial academician to express his conclusions derived from a non-political interpretation of the Constitution to which everybody in India must profess to swear allegiance. It is difficult to convince people engrossed in power politics that to love his motherland is the birthright of *everyone* born in this country and that it does not need to don any particular cap or to hoist the banner of any particular hue.

Those who believe that communal harmony and the unity of India can be achieved only by granting more and more *extra*-Constitutional privileges forget the adage—'once an infant always an infant'; and also the fact that communalism is a vicious circle : the cry of 'Muslim in danger' gave birth to Hindu fundamentalism and, similarly, the slogan of 'Muslim sentiments' has given rise to the plea of 'Hindu sentiments'.[70] There will be no end to these pernicious currents or cross-currents so long as everybody is not told firmly that all of us, including the administrators, are bound by the Constitution which we adopted as the 'People of India', (-) under which there is no room for Hindu Indians or Muslim Indians, but there is only one Nation, namely, Indian, which is solidly bound by a tie of fraternity. If we have any respect for the Constitution of India, we must tear off from the political history of India those baneful pages which have become anachronistic and stand in the way of our national unity even after the adoption of the Preamble to the Constitution of *divided* India.

Let me, in the present context, stray into a personal (but relevant) digression. As a schoolboy (not knowing anything about politics or communalism) I was attracted by the national songs which inspired the 'non-Co-operation' meetings and processions. One of the few that I still remember was—

"*Ekbar tora ma baliye dak jagata-janara sravana jurak*
Tris koti kanthe mayere dakile thas dik sukhe hasibe . . ."

It depicted India as our motherland and exhorted all the people, without any exception, to call her 'mother'. The Muslim leaders who participated in these meetings and processions never objected to this representation of one's birth-place as 'mother' nor did the Muslim masses ever imagine that 'Muslim sentiments' would be prejudiced thereby, just as a staunch Hindu did not object to the singing of another piece—

"*Ram Rahim no juda karo bhai, dilki sachha rakho ji* . . . ,"

which exhorted the Hindus not to treat Ram and Rahim as different entities.

If today, more than half a century after independence, we are on the reverse gear, it is for the political parties to search their heart to find if they are in any way responsible for this great 'Fall' for which divided India shall have to lament through all futurity. It is no good throwing mud on each other. All of us have forgotten the history of our independence, the ideals of those who brought about that independence, and the Constitution which enshrines those ideals.

In fact, decline of national sentiments has generated obnoxious selfishness and greed, forgetting all the while that members of Parliament own the vote of the people on the shameless profession that they would *serve* the country. The result has been a fall of the ideal of Parliamentary democracy for which the Nationalists fought the crusade for independence. Few Parliamentarians today are duly cognizant of the basic provisions of the Constitution, the fundamental law of the land,—and the respect which it demands.

Failure of Parliamentary democracy.

The narrow-mindedness and selfishness of the 'representatives' of the people was shamefacedly illustrated when on the last day of sitting of the Ninth Lok Sabha, the M.P.s unanimously voted for ensuring their pension, and at an enhanced rate, even though the Lok Sabha was dissolved after a short duration,—without caring to see that a bill or motion having financial liability could not be introduced without the President's recommendation [*Art.* 117(1) of the Constitution].

A more fundamental cause of the trend towards the failure of Parliamentary democracy is that since the beginning of the present decade, violence and extermination of opponents is being resorted to as an easier mode of winning an election. The foundation of Parliamentary democracy is an 'appeal from the bullet to the ballot'.

The new generation of young voters.

Amidst this abysmal gloom, a ray of hope has been flashed by the fact that by the 61st Amendment Act 1988,—amending Art. 326,—the voting age has been lowered from 21 to 18 years, as a result of which younger blood has been infused into the electorate of India, since the 1989—General Election. The result has been that it would no longer lie in the mouth of the elders to keep students away from politics. What the students have so long been doing surreptiously in the educational institutions, they will now do it as a matter of right. Now, therefore, it will be a concern of every young man to be apprised of the objectives of each of the political parties and to decide which way he himself would be inclined. All this means degeneration of academic education, no doubt, but it will bring forth a new generation of students who would realise that they are not tools in the political machinery, to be wielded by political leaders to serve their selfish ends,—but the very foundation of Parliamentary democracy in India.

Of course, mere lowering of the voting age will not give a young man an opportunity to enter into the administration at once, so long as the qualifying age of membership of the Legislature is not lowered down from 25 years for the House of the People or the Legislative Assembly of a State. The period between 18 and 25 is the brewing time given to the younger generation to equip themselves for taking up the reins of government from professional politicians who have repeatedly proved their failure. Time has come for them to realise that they cannot reach their objective by political slogans or breaking their heads on the streets, but by acquiring political education and encyclopaedic knowledge ranging from nuclear science to agriculture and the mass of laws by which this vast country is governed,—so that they can usher in an age of efficient administration, if and when they come to power.

At an election held in the U.K. or the U.S.A., hardly a life is lost in the election campaign, during which opposing contestants address newsmen and the voters from the same platform,—presenting alternative programme to solve the same national problems, from which the electorate can make their choice for a new Government.

In India, on the other hand, it has become commonplace that when a political leader is determined to win an election at any cost he has to use younger people as tools in his election campaign of bloodshed. It is young people who either kill or are killed. At the General Election of Parliament held in November 1989, over 100 lives were lost in the election clashes and a similar figure is to be attributed to the State Assembly election in several States which took place in February, 1990. At the election for the 10th Lok Sabha held in 1991 the death toll has exceeded 289 (Present position is not available). Side by side was the open declaration of a Chief Minister that, whatever might be the result of a Poll, the issue of a certificate of the Returning Officer was under his control. This cannot be brushed aside as a hyperbole because it was attended with unlawful practices which led to unprecedented intervention by the Election Commission in some such States.

This is not Parliamentary democracy, but its death-knell. It will be a glorious failure of democracy in India if the younger generation does not cry a halt to this scheme of massacre. It is for them to rise as a man to protest against the nefarious mandates of the heads of various political parties.

Every Indian must look forward, to build up an India which will stand as a man against whatever calamity befalls our lot. The responsibility therefore lies on the younger generation to build up a united and stronger India, where each man will play the role of a poet, philosopher, warrior, and administrator, rolled in one, in the cause of the Motherland,—which stands paramount to the narrower interests of his family, community or political affiliation.

Before concluding, I should mention certain glaring events which have changed the background in the history of constitutional development in India.

So long there was one major Political Party, namely the Congress, while there were a number of groups or factions, composed of dissidents, apart from the Leftists Parties who held views radically different from the rest. The decline of Communism in Europe, including the U.S.S.R. itself, has made it impossible for the Leftist to present an alternative government at the Union level. Instead has emerged the Bharatiya Janata Party (known as the B.J.P.), as an effective Opposition Party, with evident potentiality.

Controversy as to the true meaning of 'secularism'.

It seems that at future elections, the issue will be as to the meaning of 'Secularism' in the Indian Constitution. The case of the B.J.P. is that secularism means *equal* treatment of all the religions and not a favourable treatment (extra-constitutional) of the minority, or rather, the Muslims (who constitute the major group amongst the minorities), in order to secure their votes, which is decisive because the majority, that is the Hindus, are divided into numerous Political Parties. According to the B.J.P., what the Ruling Parties have been doing so long is to pamper "Muslim sentiments", for which there is no provision in the Constitution over and above the safeguards embodied in Arts. 29, 30, and the like. The Constitution, on the other hand, promises equality to every individual, irrespective of religion [*Arts.* 15 and 16].[71]

In the 1996 Lok Sabha Election, although B.J.P. got the highest number of seats, it could not attain absolute majority. It seems that at the next General elections the political parties would be compelled to fight the elections being divided mainly into two camps—(a) B.J.P. and (b) non-B.J.P. This did actually happen in 1996, but in a different manner—the anti-B.J.P. Parties united against the B.J.P., but without surrendering their separate entities. The result was formation of Coalition Governments formed by 13 minority parties, headed by Mr. H.D. Deve Gowda and later on by Mr. I.K. Gujral, which tottered ever since their formation and collapsed within a year of their formation. In 1998 Parliamentary elections, the B.J.P. emerged as a single largest party and again a coalition Government was formed headed by Mr. Atal Bihari Bajpayee with a political uncertainty to complete its full term.

Unstable government and rule by a Party lacking majority.

Both at the elections held in 1989 and 1991 (for the 9th and 10th Lok Sabhas, respectively), the largest single Party has failed to secure an absolute majority; yet, in order to avoid another election, it was allowed to form a government with the tacit support of some other Parties who, however, refused to enter into a coalition government and share the responsibilities of the Party in power. The result has been the successive fall of a minority government as soon as the supporting Party withdraws its support on some issue on which it has taken a contrary stand. This has happened to the governments headed by Mr. V.P. Singh and Chandra Shekhar.

On the other hand, a Muslim religious leader has urged the Muslims to thwart both the Congress(I) and B.J.P. by voting against both and forming a Government, if possible, by uniting with other divisive forces such as those who preach class hatred on the basis of casteism or poverty. The action of the Muslim religious leader is only the other side of the coin to mix up politics with religion; but it will require another Supreme Court decision to put it down for the sake of maintaining the *unity* and *integrity* of the Indian Nation.

Resort to Presidential system, no solution.

Some people think that since we have failed in the game of parliamentary democracy, we should now try our hand at the Presidential form of Government. Without going into the merits and demerits of the two systems, a jurist should point out that this will *not be possible* because an amendment of the Constitution, which will be necessary for the purpose, will not be tolerated by the Supreme Court so long as the thirteen-Judge dogma that the Parliamentary system of Government is a 'basic feature' of our Constitution[72] is not turned down by a larger Bench,—which would be another Herculean task.

We have, therefore, to remain contended with the Parliamentary system.

Apart from this, unless corruption is rooted out from the grass roots, a change over to the Presidential system will merely result in the installation of irresponsibility and autocracy, wherefrom shall we get a 'clean' President and a nationally inspired electorate to keep him under control?

A cool thinking of all the foregoing considerations will enable us to realise that in order to save our democracy, each one of us should make a *sincere* and concerted effort to root out dishonesty and corruption, withdraw all support from 'political murders' and communal riots and should love our country as we love our mother. This can be achieved if only we realise the *true* tenets of our respective religions, for no religion teaches otherwise.

REFERENCES

1. A critical survey of the 42nd and 44th Amendments are to be found in Author's *Constitutional Law of India* (Prentice-Hall of India, 4th Ed., 1985), pp. xxxix to lvi; and *Constitution Amendment Acts.*
2. Subsequent to the publication of this suggestion at p. 361 of the eleventh edition, Government of India had appointed the Sarkaria Commission, under pressure of political circumstances. The scope of this Commission, however, was a review of the Centre-State relations, *i.e.*, the *federal* provisions and not a comprehensive revision of the Constitution as suggested by this Author. Ere long, this shall have to be undertaken.
3. See Author's *Commentary on the Constitution of India* (6th Ed., Vol. F, pp. 248-50).
4. *Keshavananda* v. *State of Kerala,* AIR 1973 S.C. 1461. The process of supplanting the Fundamental Rights by the Directive Principles, however, received a set-back at the hands of a 4:1 decision of a Constitution Bench of the Supreme Court in the much-debated case of the *Minerva Mills* v. *Union of India,* AIR 1980 S.C. 1789 (paras 60, 70, 80), as a result of which the extension of the protection of Art. 31C to legislation to implement "all or any" of the Directives in Part IV, made by the 42nd Amendment of 1976, was held to be void on the ground that it disturbed the basic structure of the Constitution which rested on a balance between the Fundamental Rights and the Directives, by excluding judicial review altogether in respect of such laws. The result of this decision was that a legislation to implement only the Directive under Art. 39(b)-(c) would receive the protection of Art. 31C, as prior to 1976.

   While the Indira Government had been seeking to get the decision in the *Minerva Mills* case overruled, another Division Bench [in *Sanjeev Coke Co.* v. *Bharat Coking,* AIR 1983 S.C. 239 (*para* 13)] came to the rescue of the Government in an indirect way, by indicting the view taken by 4 of the Judges of the Supreme Court [CHINNAPPA REDDY, VENKATARAMAIAH, BAHARUL ISLAM AND BHAGWATI, JJ. (who had dissented in the *Minerva Mills* case)]. In the opinion of these 4 judges, the decision in the *Minerva Mills* case as regards Art. 31C was *obiter, i.e.*, uncalled for by the pleadings in the case.
5. *India, 1984,* pp. 231ff.
6. CHANDA, *Federal Finance,* pp. 279, *et seq.*
7. *Ibid.*, p. 186.
8. *Statesman,* 18-7-1967, p. 1.
9. See, for instance, *Atiabari Tea Co.* v. *States of Assam,* (1961) 1 S.C.R. 809 (*860*); *Automobile Transport* v. *State of Rajasthan,* AIR 1962 S.C. 1406 (*1416*); *Kadar* v. *State of Kerala,* AIR 1974 S.C. 2272.
10. Cf. *State of West Bengal* v. *Union of India,* AIR 1963 S.C. 1241 (*vide* Author's *Comparative Federalism,* Prentice-Hall of India (1987), pp. 167ff).
11. It would have been impossible to achieve this strength over-night if the unitary elements in the Constitution had not been utilised by the Union in times of peace to make the country understand that strength lay in greater cohesion and unity. The Author is therefore unable to agree that "the most surprising thing about Indian politics during the last ten years is that, while keeping intact the formal legal relations, the distribution of functions, powers and finances between the Union and the States has been altered to an extent that was *not at all contemplated by the Constituent Assembly*" (Santhanam, Union-State Relations, 1960, vii).
12. Bangladesh itself has raised an unexpected problem for India, having turned into an Islamic Republic in the lap of the Islamic States of the world and aspiring for a 'confederation' with Pakistan.
13. *Statesman,* 11-5-1983; 21-6-1983, p. 8.

14. An elaborate treatment of this topic is to be found in Author's *Constitutional Aspects of Sikh Separatism* (Prentice-Hall of India, 1985). [Reference in the following footnotes is to pages of this booklet].
15. Many Opposition Parties joined with the Akalis to form the "*Opposition Conclave*" (p. 6, *ibid.*).
16. A resolution adopted by the Akalis at the Anandpur Gurudwara on October 16, 1973 and ratified by the All India Akali Sammelan in October, 1978, at Ludhiana [*Vide* pp. 2ff., *ibid.*].
17. Raising a volunteer force of 1 lakh at the first instance [*Statesman,* 14-3-1983] and a '*suicide squad*' [pp. 15-16, *ibid.*].
18. It is not correct to say that the agitation for 'Khalistan' is the work of a group of terrorists. The steps in which it has advanced from Akali organisations cannot be overlooked; 54th All-India Educational Conference of the Chief Khalsa Dewan—asserting that the Sikhs were a *separate* Nation and should also be admitted to the U.N. as a member—'Khalistan' [18-3-1981]; Reiterated by the Shiromani Gurudwara Prabandhak Committee [*Times of India,* 30-8-1981]; Anandpur Sahib Resolution; as presented by the Akali Dal (Talwandi) at the World Sikh Convention [April, 1981],—asserting that the Sikhs are a separate Nation and that this status of the Sikh Nation has been recognised by the major Powers of the World; letter written by the Akali Leader Bhindrawale to Jagjit Singh, the 'Khalistan' leader in London [*Statesman,* 6-1-1983]; Sant Longowal's thesis that Sikhs are a 'separate race' [*Statesman,* 16-6-1983]; harbouring extremist leaders and criminals [*Statesman,* 20-6-1983, p. 7; ibid., pp. 1, 15-18].
19. *Ananda Bazar Patrika,* 18-5-1985.
20. *Statesman,* 25-7-1985.
21. Cf. *Statesman,* 15-4-1987. [The Chief Minister thinks that it may be abated by the Government of India releasing the army deserters and mutineers who are detained in the Jodhpur Jail, as demanded by the AISSF (*Statesman,* 14-3-1987). It is impossible for any Government to give a blanket amnesty to mutineers if mutiny in place of discipline is to be prevented from being the order of the day, in the ranks of those who are entrusted with the defence of the State. To meet the demand halfway, Government of India has announced its decision to review the cases of these detainees *individually.* It does not appear, however, that anybody has given the assurance that the released mutineers or deserters will not swell the ranks of terrorists.]
22. The present agitation, in fact, is not a new movement, but is a logical sequel of the '*Bangal Khedao*' movement which started as a language drive, some three decades ago. It would be an eye-opener to many people in other parts of India, that one group of the agitators calls its movement as 'the 18th war of *independence*', to carve out a separate homeland for the Assamese who belong to the Mongolian stock, with a separate flag [*Time,* 7-3-1983].
23. Good sense has prevailed with the agitators to realise this [*Statesman,* 23-3-1983, p. 1]. But though the Tribunals set up for this purpose [*Statesman,* 7-6-1983] has done substantial work by May, 1987, there has been a stalemate in finalising the decisions of the Tribunal owing to a controversy on principles.
24. On 16-8-1985, the Government signed an agreement with Assam leaders as a result of which elections were conducted, leading to the Assam Gana Parishad taking up administration of the State. Subsequently the ULFA (United Liberation Front of Assam) started a reign of terror by murdering non-Assamese and extorting money from them. It reached a point where people left as if there was no government in Assam. Consequently, President's Rule was declared on 28-11-1990, after dismissing the Assam Gana Parishad Government headed by Mahanta owing to its failure to combat terrorism.

    An election was held in 1992 leading to a Congress (I) Government under Hiteswar Saikia as the Chief Minister. He is still struggling against the ULFA and Bodo militants.
25. *Statesman,* 18-7-1986.
26. Critics say that the illegal immigrants have been entertained by the Parties in power by granting them Ration Cards and eventually entering their names in the Electoral Roll [cf. *Ali* v. *E.R.O.*, AIR 1965 Cal. 1 (paras 1, 6)], in order to gain their votes.
27. *Statesman,* 13-2-1991; *Anandabazar,* 15-2-1991.
28. If they succeed in this plan, they will simply fulfil their pledge to 'recover Hindusthan by a joke' (*larke lia Pakistan, larke lenge Hindusthan*), which was their slogan at the time of the Referendum held in 1947 in Sylhet.

29. *Anandabazar,* 8-8-1992; *Statesman,* 15-2-1991; 2-8-1991.

30. The secessionist nature of the *Gorkhaland* agitation is veiled and equivocal and not so patent as in the case of that for *Khalistan,* and that is why the Government of India was initially misled to assume that the *Gorkhaland* agitation was not anti-national, until the Government of West Bengal came out with a well-documented White Paper (in two Parts) which gives written evidence of what the GNLF (Gorkha National Liberation Front) means, according to its 'President' Ghising.

    The *Gorkhaland* agitation relates to the West Bengal District of Darjeeling where a large number of Nepalis reside as immigrants (for work), under a reciprocal treaty of friendship between India and Nepal of 1950. The GNLF claim that Darjeeling was a part of Nepal and came to the British Government by way of cession from Nepal is, however, not correct because the territory of Darjeeling belonged to Sikkim and Bhutan and the British acquired the territory by grant, agreement or annexation of which the other party was not Nepal but Sikkim or Bhutan, during the 19th Century. Nepal entered into the 1950 Agreement with India, because the immigrants to Darjeeling were people of Nepali origin (*Gorkhas*) whereas many Indians were similarly residing in Nepal, so that 'reciprocal rights and privileges' were to interest to both Nepal and India.

    The agitation for Gorkhaland took a concrete shape by the submission of a Memorandum by the GNLF leader to the King of Nepal on December 23, 1983 (Appendix A to the W.P., Part I). This contained clearly a demand for creating a separate State for the Gorkhas in the territory of Darjeeling, which the Memorandum claimed to be a ceded territory of Nepal. The appeal was to the King of Nepal to revoke all treaties and agreements which might stand in the way of severing Gorkhaland from India. It also spoke of the 'right of *self-determination*' of the Gorkhas and copies of this Memorandum were simultaneously sent to the heads of foreign States, such as the U.S.A., France, Pakistan, Britain, the United Nations besides India. There was *not a word* in this Memorandum as to Gorkhaland being created as a separate State *within* the Union of India. The birth of the Gorkhaland movement was thus clearly for *secession* from India.

    As Appendix B to the W.P. (Part I) shows, on June 2, 1985, the GNLF leader made a speech wherein he admitted that the Government of Nepal or the U.N. had not responded to his claim for a separate sovereign State. This speech was, in fact, made after the Government of India, realising its initial blunder, told the GNLF leader that there would be no talk with him until he gave up his claim for a sovereign State outside India. In para 2 of this speech, therefore, the leader says that 'we do not want to get separated from India . . .but have demanded . . . separate State within Indian Union". Curiously, however, in the succeeding paragraphs, he reiterated his story that Darjeeling came to the British by way of cession from Nepal, and in the concluding paragraph he clearly urged for a 'separate sovereign' State, just as other small countries had been recognised as separate States by the U.N.

    The Author had, in a previous edition suggested that if the Government of India does not create a separate State is would have to offer regional autonomy after its terms were settled by a tripartite talk between India, West Bengal and Gorkha leaders. This has come to be true. In July, 1988, an agreement was signed creating a Darjeeling Gorkha Hill Council, followed by election in pursuance thereof, and Subhas Ghising has been elected Chairman of the Council.

    It is high time that the Union Government pays adequate attention to other separate movements which appear nascent for the time being, such as the 'Jharkhand' movement of tribals in West Bengal, Bihar and adjoining areas; the demand for 'Udayachal' by the tribals of the north-eastern regions; for Nagaland for 'Christ' [*Statesman,* 12-6-1983], or the demand for 'Greater Mizoram' [*Statesman,* 23-8-1986], and so on.

31. By the Constitution (71st Amendment) Act, 1992 [see Table XX, *post*].

32. *Yugantar,* 8-4-1990.

33. See the recommendations made by the Report of the 'Centre-State Relations Inquiry Committee' of Madras (1971), pp. 216-17. In order to counteract the formation of the Southern Council of the Chief Ministers of Tamil Nadu, Andhra Pradesh, Karnataka and Pondicherry, the Central Government set up the Sarkaria Commission to review Centre-State relations [*Statesman,* 24, 25-3-1983]. All nationalists should long after an amicable solution of the problem without impairing the strength of the Union.

34. Cf. *In re* Sea Customs Act, AIR 1963 S.C. 1760 (para 62); Author's *Comparative Federalism* (Prentice-Hall of India, 1986); p. 628.
35. Cf. Reference under Art. 143, AIR 1965 S.C. 745.
36. The Author is tempted to reproduce what he said in this context more than two decades ago: "Fragmental changes... cannot achieve the purpose where the change in the public opinion is so rapid as in India today. In fact, each step ahead in material or social advancement is enlarging the mental horizon as well as the demands of the masses. If this is to be met halfway, by way of averting anything like a revolution, an overall rethinking is necessary. . ." [Author's Tagore Law Lectures on *Limited Government and Judicial Review*, pp. 13-14].
37. *State of Rajasthan* v. *Union of India*, AIR 1977 S.C. 1361 (*1413*) C.B.; *Minerva Mills* v. *U.O.I.*, AIR 1980 S.C. 1789 (paras 21, 26, 93-94, 104) C.B.; *Kihota* v. *Zachilhu*, AIR 1993 S.C. 412 (paras 18, 46, 104) C.B.; *Bommai* v. *U.O.I.*, AIR 1994 S.C. 1918 (para 30)—9 Judges; *Kaul* v. *U.O.I.*, (1995) 4 S.C.C. 73 (para 12).
38. *State of Karnataka* v. *Appa*, (1995) 4 S.C.C. 469.
39. *Ravichandran* v. *Bhattacharjee*, (1995) 5 S.C.C. 457.
40. *Bandhua* v. *U.O.I.*, AIR 1984 S.C. 802 (para 10); *State of H.P.* v. *H.P.S.R.C.*, (1995) 4 S.C.C. 507 (para 17); *State of Maharashtra* v. *Manubhai*, (1995) 5 S.C.C. 730; *Vishal* v. *U.O.I.*, AIR 1990 S.C. 1412 (paras 8, 14); *Indra* v. *U.O.I.*, (1990) Supp. (3) S.C.C. 217 (paras 22-28)—9 Judges.
41. This hoax has already raised its head under the Deve Gowda Coalition Ministry, in 1996.
42. An example of this is a direction by the Supreme Court for creation of an All-India Judicial Service. The Constitution (*Art.* 312) lays down that for creation of an All-India Service, Rajya Sabha must pass a resolution with the support of two-thirds of the members present and then Parliament may provide for it by enacting a law. A directive by the Court cannot supplant a clear constitutional provision. Similarly to state that 'consultation' means 'concurrence' is also stretching the language to a breaking point and is nothing but amending the Constitution under the colour of interpretation [*Supreme Court Advocates* v. *Union of India*, (1993) 4 S.C.C. 441 and *Special Reference No. 1 of 1998*, Re:, (1998) 7 S.C.C. 739 (9-Judge Bench)].
43. DALWAI, *Muslim Politics in Secular India*, (1972), quoted in the Author's *Commentary on the Constitution of India*, 6th Ed., Vol. D, pp. 220-21. The *modus operandi* of all such disruptive forces is to advance step by step: at first a feeler is sent into the air and after it receives circulation and the initial shock is absorbed. The meek demands are crystallised and further extended, taking advantage of the fact that non-Muslim political parties vie with each other in conceding such demands, in whole or in part, in order to secure Muslim votes. That was how Pakistan was built up. The same history is being repeated. Thus, while originally the demand was for communal representation in the Government Services, the Indian Muslim League has since 1979 extended the demand to such representation in the Public Sector Undertakings and technical establishments, the army and the police. Similarly, the demand for aid for the promotion of Urdu has come to be a demand that Urdu should be recognised as an Official Language under Art. 347 of the Constitution even in those States where the Urdu-speaking people do not form a *substantial* proportion of the population of the State concerned, such as West Bengal. The paradox of the situation is that while in Bangladesh, the Muslims themselves are fighting for the propagation of the Bengali language (in place of Urdu which the Pakistani military regime sought to inject into the Bengali-speaking population) the Muslims of West Bengal whose mother-tongue is Bengali are making a frantic effort to speak in Urdu in the public conveyances, market places and the like, and also to represent at the time of census that their mother-tongue is Urdu. The next step is to demand that the Government Offices in West Bengal must have Urdu typewriters and typists, even though there may not be any official paper in Urdu to be typed. One has to rub his eyes to find that since March, 1985, this Urdu separatism has led to the demand that the Urdu speaking non-Bengali industrial areas of West Bengal should be given the status of 'Urdustan' [*Ananda Bazar Patrika*, 28-8-1985; *Jugantar*, 29-3-1985; 6-4-1985].

Those who have learnt a lesson from the Partition in India can hardly shut their eyes to what has happened in Kerala. During the United Front Ministry (1967-69), a separate Muslim majority district was formed, named Malappuram. In 1983, the United Democratic Front Government, led by Congress(I) has conceded the demand for the formation of a second Muslim majority district with Kasargod as its headquarters

[*Statesman,* dt. 27-2-1983]. No less alarming is the utterance of a responsible Government dignitary that already there are pockets at places in West Bengal, like Asansol, Murshidabad, where Urdu-speaking Muslims form a majority. A student of Constitutional Law can only point out that the Supreme Court has held that the question of minorities has to be determined with reference to the population of the *entire* State [In re Kerala Education Bill, AIR 1958 S.C. 956 (para 21)]. To say that the Muslims residing in a particular pocket constitute the majority is to majorise them within the pocket, while they continue to derive minority safeguards and benefits available to every Muslim in the State as a whole. To make light of this ominous trend is to pave the way for the next demand for the formation of a second Pakistan in such Muslim pockets in Kerala, West Bengal and other States.

Anybody who assumes that to meet ever-aggressive demands of a religious minority is to foster 'secularism' should note that it would be the highest form of communalism to support one religion as against the majority who are to lead in a Parliamentary form of Government.

44. The Niyogi Commission (headed by a retired Chief Justice of the Nagpur High Court) quoted in Author's article in the *Truth*, Calcutta (Vol. 47, no. 8, 8-6-1979, at p. 115 (para 4), observed: "At the root of these activities is their ambition to carve out a *separate Christian State* for themselves on the strength of their numbers". Vide also Chief Minister, Tripura's statement in *Ananda Bazar Patrika*, dt. 6-8-1984.

45. All-Indian Muslim Conference at Lucknow [*Statesman*, 29-12-1978; 11-12-1979]; See also Muslim League's demand in Kerala [*Statesman*, 27-2-1983].

46. *Nain Sukh* v. *State of U.P.*, AIR 1953 S.C. 384 (*385*); *State of Madras* v. *Champakam*, (1951) S.C.R. 525 (*530, 533*); *Triloki* v. *State of J. & K.*, AIR 1969 S.C. 1.

47. On this point, it is worthwhile to reproduce the illuminating words of AHMADI, J., as he then was, in the 9-Judge case of *Bommai* v. *Union of India*, AIR 1994 S.C. 1918—

"*The experience of partition of the country and its aftermath had taught lessons which were too fresh to be forgotten by our Constitution-makers.* It was perhaps for that reason that our founding fathers thought a strong centre was essential to ward off separatist tendencies and consolidate the *unity and integrity* of the country" (para 21).

"The British policy of divide and rule, aggravated by *separate electorates based on religion,* had added a new dimension of mixing religion with politics which had to be countered. . . ." (para 24).

"Since it was felt that *separate electorates for minorities were responsible for communal* and separatist tendencies, the Advisory Committee resolved that the system of reservation for minorities, excluding S.C./S.T., *should be done away with . . .*" (para 26).

See also *Poudyal* v. *U.O.I.*, AIR 1993 S.C. 1804 (paras 30-33).

48. *Statesman,* 30-11-1979 (Zakir Hussain Memorial Lecture).

49. It should be noted that so far as the linguistic interests of Minorities are concerned there is already a provision for the appointment of a Special Officer for linguistic minorities, in Art. 350B.

50. Parliament has enacted on 17 May, 1992, the National Commission for Minorities Act, 1992 for constituting a statutory Commission. The Act defines "minority" as a community notified as such by the Central Government.

The functions assigned to the National Commission for Minorities are to (see s. 9)—

(a) evaluate the progress of the development of minorities under the Union and States;

(b) monitor the working of the safeguards provided in the Constitution and in laws enacted by Parliament and the State Legislatures;

(c) make recommendations for the effective implementation of the safeguards for the protection of the interests of minorities by the Central Government or the State Governments;

(d) look into specific complaints regarding deprivation of rights and safeguards of the minorities and take up such matters with the appropriate authorities;

(e) cause studies to be undertaken into problems arising out of any discrimination against minorities and recommend measures for their removal;

(f) conduct studies, research and analysis on the issues relating to socio-economic and educational development of minorities;

(g) suggest appropriate measures in respect of any minority to be undertaken by the Central Government or the State Governments;

(h) make periodical or special reports to the Central Government on any matter pertaining to minorities and in particular difficulties confronted by them; and

(i) any other matter which may be referred to it by the Central Government.

For the full text of this Act, see App. I to the Author's *Human Rights in Constitutional Law.*

51. The *Jamiat-ulama-i-Hind* goes to the extent of urging for the deletion of Art. 44 [*Statesman,* dt. 2-10-1979, p. 3] or to exempt Muslims from its operation [*Statesman,* 8-4-1985].

52. This view has been supported by many Muslim Judges and scholars who possess special knowledge about the Shariat [see Author's *Commentary on the Constitution of India,* 6th (Silver Jubilee) Ed., Vol. D, pp. 222-23].

53. If Government yields to this demand of the Muslim now, could it resist a similar demand of the Christians and the nascent demand of the Akali leader that there should be a separate code of personal laws for the Sikhs [*Statesman,* 16-6-1983]. For similar demand for Christian converts; which has been turned down by the Supreme Court, see *Soosai* v. *Union of India,* AIR 1986 S.C. 733 (para 8).

54. *Ananda Bazar Patrika,* dt. 5-2-1982.

55. A Muslim divorced wife brought an application for maintenance under s. 125 of the Criminal Procedure Code, which was decreed. The husband appealed to the Supreme Court on the ground that s. 125 should not apply to Muslims as it is contrary to Muslim Personal law. The Supreme Court rejected this contention upon the interpretation of s. 125, namely, that it applied to all 'persons', irrespective of their religion or personal law, and dismissed the husband's appeal.

In the judgment [*Ahmed* v. *Shah Bano,* AIR 1985 S.C. 945 (para 32)], the Supreme Court observed that it was a pity that the State had not made any attempt to make a common Civil Code even though Art. 44 issued a clear mandate on the State in this behalf,—whether the lead came from the Muslim community or not:

"*A belief seems to have gained ground* that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies . . . *It is the State which is charged with the duty of securing* a uniform Civil Code for the citizens of the country. . .".

The Supreme Court repeated its views on Art. 44 in *Jorden* v. *Chopra,* AIR 1985 S.C. 935 (para 1).

As a learned Professor of the Bombay University, Prof. Siddiqui, **observed**, if the State took the lead, ultimately the Muslim community would accept it because it was in accord with the notions of modern civilised society;

"The issue should not be decided in terms of textual conformity with the Koran but in the context of *modern civilised society.* And then even if the law goes against the Koran, the Government must enact it. Ultimately, the community will accept it" [*Sunday Observer,* 6-5-1984].

Overriding the clear observations of the Supreme Court and rejecting the protests of a large section of the Muslim community, including learned scholars, however, the Congress(I) Government enacted the Muslim Women (Protection of Rights on Divorce) Act, 1966, providing that the statutory provisions contained in this Act should govern, unless the divorced woman and her former husband apply to the Court that they would prefer to be governed by the provisions of s. 125, Cr. P.C., as to the right of maintenance of the divorced wife.

The Congress (I) Government thus, gave way to the Muslim fundamentalists to violate the Supreme Court decisions as well as the Constitution, which enjoined the State to make a common Civil Code, overriding any personal law to the contrary. It was more surprising that the National Front Government's Law Minister had dittoed, declaring that there would be no common Civil Code unless the Muslim community wanted it.

56. *Ahmed* v. *Shah Bano,* AIR 1985 S.C. 945.

57. *Jugantar,* dt. 23-12-1989. [On 12-6-1996, ex-P.M. Narasimha Rao forcefully presented before Parliament the Congress case against Uniform Civil Code. The Coalition

Government of Gowda seems to adhere to this view (see Author's *Uniform Civil Code in India*, 2nd Ed., p. 42).]

58. The claim of the Buddhist converts, resurrected during the 1980 election, clearly confronts the unanimous decision of the highest tribunal in *Punjabrao* v. *Meshram*, AIR 1965 S.C. 1179, followed by *Ramalingam* v. *Abraham*, (1969) 1 S.C.C. 24; *Soosai* v. *India*, AIR 1986 S.C. 733 (para 8).

    Notwithstanding these decisions of the highest tribunal of the land and the irrefutable grounds stated at pp. 399-400, the National Front Government has enacted the Constitution (Scheduled Castes) Orders [Amendment) Act, 1990 (Act 15 of 1990) extending the Scheduled Caste privileges to the Buddhist converts from Hinduism.

59. *Indra Sawhney* v. *Union of India*, (1992) Supp. (3) S.C.C. 217 (paras 399, 782). Noble laureate Mother Teresa participated in a demonstration at Delhi on 18-11-1995 demanding reservation for scheduled caste christians.

60. Prime Minister Rao failed to achieve it through an ordinance. His successor Gowda intended to have it through a Bill.

61. This statement of the Author has been criticised as an '*ipse dixit*' by Mr. Noorani [*Statesman*, 27-6-1995]. Mr. Noorani has not repelled any of the reasons given by this Author at pp. 400ff. of the 16th Ed. of the 'Introduction', *viz.*—(i) In the international sphere, the minority problem arose when the population of a country came to be directed *against their will*, by external circumstances, such as war, to another country so that the divided community which became a minority in another country needed safeguards to save them from ethnic extinction. On the other hand, the Muslims obtained the Partition of India on their own demand on the footing of the 'two-Nation' theory, and even after that Partition, a section of the Muslim community preferred to remain in India out of their *own* choice; nobody compelled them to remain in *divided* India (which was a creation of theirs).

    (ii) When they opted to remain in divided India, they did not enter into any *covenant* with the Government of divided India. No observation of Moulana Azad can be enforced as a legal covenant in an international court.

    (iii) The leaders of divided India incorporated in their Draft Constitution certain safeguards for minorities, notwithstanding the Partition, because they refused to concede on principle, that the Muslims in India constituted a separate Nation. That India constituted one Nation whose unity and integrity must be maintained was proclaimed in the very Preamble of the Draft Constitution of divided India. The Muslims who opted to remain in divided India did so with their eyes open to this Preamble and the safeguards for minorities included in that Draft.

    These have ultimately been embodied in Arts. 25-30 of the Constitution as finally adopted in 1949. Hence, all the safeguards in Art. 27 of the International Covenant are already embodied in the Constitution of India, *viz.*, the right (a) to enjoy their own culture [Arts. 29-30]; (b) to profess and practice their own religion [Art. 25(1)]; and (c) to use their own language [Art. 29(6)]. If any of these rights are infringed, any member of the minority community can legally enforce them in the national Courts under Art. 32 or 226.

    (iv) But the Muslims and their advocates are not contended with this. They want things beyond what is already contained in the Constitution adopted by the 'People of India' (which included the Muslims who opted to remain in India), *e.g.*, to eliminate or scrap Art. 44 of the Constitution—which enjoins the Government of India to make a common civil code for all the people of India. The highest Tribunal of the land which is also to abide by Art. 44 (by reason of Art. 36), read with Art. 12, has been repeatedly reminding the Government of India of their duty to implement Art. 44, when more than half a century has elapsed since the adoption of the Constitution.

    As against this, what covenant will a journalist produce before an international forum to establish the case of those who are still fostering the ghost of the 'two-Nation' theory, to disintegrate the unity of India, and to override the highest law of the land.

    On this point, I can do no better than to quote from a recent Supreme Court judgment [*Mudgal* v. *Union of India*, AIR 1995 S.C. 1531 (para 35)].

    "Those who preferred to remain in India after the Partition, fully knew that the Indians did not believe in the two-nation or three nation theory and that in the Indian Republic there was to be only one Nation—the Indian Nation—and *no community* *could claim to remain a separate entity on the basis of religion.*" [See also *Bommai* v. *Union of India,* AIR 1994 S.C. 1918 (para 21)—9-Judges.]

No dogmatism of a journalist, coloured by a communal vision, can demolish the foregoing observation of the highest tribunal which is founded on patent history.

(v) It is an amazing evidence of the foresight of the Indian leaders that even though the International Covenant on Civil and Political Rights was made some two decades later, they anticipated the contents of Art. 27 of the International Covenant and embodied them in the Draft Constitution. But that cannot confer on the Muslim Separatists any right to go further, against the undenied facts of Indian history [vide *Poudyal* v. *Union of India,* AIR 1993 S.C. 1804 (paras 30, 51) C.B.].

62. Resolution of the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities (1950).

63. *Imam Bokhari* at the Babri Masjid rally [*Statesman,* 30-1-1987].

64. *Vide* 47 Truth (11-1-1980), p. 569. [See Author's *Uniform Civil Code for India,* Prentice-Hall of India, 2nd Ed., 1997.]

65. DALWAI, *Muslim Politics in Secular India* (1972), pp. 48, 50-52, 72, 76, 96.

66. It is only one step forward to condemn the Indian Constitution itself as worthy of being burnt down, for its failure to offer communal representation and like reservations in favour of the Muslims, so as to violate the Prevention of Insult to National Honour Act [see the report from Bareilly, at p. 9, col. 4 of *Statesman,* dt. 8-11-1982].

67. Space does not permit to deal with the problem of minority in India comprehensively, in a book of this introductory nature. Those who want to study further may read the Author's *Commentary on the Constitution of India* (6th Ed.), Vol. D, pp. 206-09; 217-28; 232-37; 248-53.

68. Of course, in some later stanzas, the motherland is described as having hands and voices, but that is nothing but a poetic way of portraying the hands and voices of all children of the soil, to whom the poet appealed for fighting for their independence, as one man. The object is not in any way different from the patriotic songs of other lands.

69. It sounds ironical to hear that the objection to *Vande Mataram,* which figured in the 11-point demands of Mr. Zinnah 1938, could be resounded through the mouth of the Muslims in the 1992-Parliament, *i.e.,* 45 years after the Partition of India. Eventually, the Parliament (of Partitioned India) had to adopt a resolution (23-12-1992) that every session of Parliament shall close with the *music* of *Vande Mataram.*

70. The demand for *namaz* on the highway has been reciprocated by that of *moha-arati* on the highway [*Statesman,* dt. 10-2-1993], forgetting that both are equally untenable under the law [vide p. 24, C7, Vol. C/1].

71. Whatever be the merits of the arguments of the B.J.P., the Supreme Court has thrown cold water upon it by laying down in the 9-Judge *Bommai* Case, AIR 1994 S.C. 1918 that 'Secularism' under the Constitution requires that.

72. *Keshavananda* v. *State of Kerala,* AIR 1973 S.C. 1461 (13-Judges).

Tables

TABLE - I

FACTS TO START WITH

(Figures rounded up, primarily on the basis of 1991 census)

India has–

an area of over 12,65,000 sq. miles (32,87,782 sq. km.) of which 10,861 sq. miles are included in the Union Territories and the rest in the States;

6,05,224 villages as against 4,689 towns; and 72.22 per cent of the population live in villages as per 2001 census;

a population 1,02,87,37,436 (*vide* India 2008, page 7) (about 16% of the world population) –of whom Hindus constitute 82.41 per cent, Muslims 11.67 per cent, and other religious together 6 per cent ; who speak as many as 1,652 languages of which 18 languages are spoken by over a lakh of people each and these 18 have, accordingly, been included in the Eighth Schedule of the Constitution.

a per capita annual income of Rs. 23,222 (as on 31.05.2006).

a literacy of 64.84 per cent of the population. [In 1951, it was 18 per cent only.]

Every man and woman of 18 and over is an elector for the House of the People and respective Legislative Assembly. At the fifth general election held in 1971, the number of persons on the electoral roll was 290 m., which is more than the population of the U.S.A. or the U.S.S.R. On the revision of the electoral roll, in 1986, this number rose up to 361 m.; and as a result of the lowering of the voting age to 18, in the 1989-election, the number exceeded 490 m. In the 1996 polls the number of voters was more than 590 million. In 14th Lok Sabha general election in 2004 the number of voters was 67,14,87,930.

General elections have been held in 1951, 1957, 1962, 1967, 1971, 1977, 1980, 1984, 1989, 1991, 1996, 1998, 1999 and 2004. [See Table XIII, *post.*]

India's Annual Budget for 2008-2009 is Rs. 7,50,884 (Plan + Non-plan) crores, of which Defence includes Rs. 1,05,600 crores.

The Constituent Assembly had its first sitting on 9-12-1946.

The Draft Constitution of India, which was prepared by the Drafting Committee of the Constituent Assembly and presented by it to the President of the Constituent Assembly on 21-2-1948, contained 315 Articles and 8 Schedules.

The Constitution of India, as adopted on 26-11-1949, contained 395 Articles and 8 Schedules. After subsequent amendments, the Constitution as it stood on 31-1-2007, contained 444 Articles and 12 Schedules.

Up to June 2006, the Constitution has been amended 94 times by Constitution Amendment Acts passed in conformity with Art. 368 of the Constitution (see Table IV).

TABLE II

STATEWISE MEMBERSHIP OF THE CONSTITUENT ASSEMBLY OF INDIA AS ON 31ST DECEMBER, 1947

PROVINCES—229

	No. of members
1. Madras	49
2. Bombay	21
3. West Bengal	19
4. United Provinces	55
5. East Punjab	12
6. Bihar	36
7. C.P. and Berar	17
8. Assam	8
9. Orissa	9
10. Delhi	1
11. Ajmer-Merwara	1
12. Coorg	1

INDIAN STATES—70

1. Alwar	1
2. Baroda	3
3. Bhopal	1
4. Bikaner	1
5. Cochin	1
6. Gwalior	4
7. Indore	1
8. Jaipur	3
9. Jodhpur	2
10. Kolhapur	1
11. Kotah	1
12. Mayurbhanj	1
13. Mysore	7
14. Patiala	2
15. Rewa	2
16. Travancore	6
17. Udaipur	2
18. Sikkim and Cooch Behar Group	1
19. Tripura, Manipur and Khasi States Group	1
20. U.P. States Group	1
21. Eastern Rajputana States Group	3
22. Central India States Group (including Bunldelkhand and Malwa)	3
23. Western India States Group	4
24. Gujarat States Group	2
25. Deccan and Madras States Group	2
26. Punjab States Group	3
27. Eastern States Group I	4
28. Eastern States Group II	3
29. Residuary States Group	4
	299

TABLE III
TERRITORY OF INDIA

(A) *As in the Original Constitution (1949)*

UNION

States in Part A	*States in Part B*	*States in Part C*	*Territories in Part D*
Assam	1. Hyderabad	1. Ajmer	1. The Andaman and Nicobar Islands
Bihar	2. Jammu and Kashmir	2. Bhopal	2. Acquired Territories (if any)
3. Bombay	3. Madhya Bharat	3. Bilaspur	
4. Madhya Pradesh	4. Mysore	4. Cooch-Behar	
5. Madras	5. Patiala and East Punjab	5. Coorg	
6. Orissa			
7. Punjab			
8. The United Provinces			
9. West Bengal			

(B) *After Seventh Amendment, 1956 up to end of 2000*

UNION

States[1]	*Union Territories*[1, 15]	*Other territories as may be acquired*
1. Andhra Pradesh	1. *Delhi*[17]	
2. Assam	2. The Andaman and Nicobar Islands	
3. Bihar	3. *Lakshadweep*[10]	
4. *Gujarat*[2]	4. *Dadra and Nagar Haveli*[11]	
5. Kerala	5. *Daman and Diu*[12, 16]	
6. Madhya Pradesh	6. *Puducherry*[13]	
7. *Tamil Nadu*[3]	7. *Chandigarh*[14]	
8. *Maharashtra*[2]		
9. *Karnataka*[4]		
10. Orissa		
11. Punjab		
12. Rajasthan		
13. Uttar Pradesh		
14. West Bengal		
15. Jammu and Kashmir		
16. *Nagaland*[5]		
17. *Haryana*[6]		
18. *Himachal Pradesh*[7]		
19. *Manipur*[8]		
20. *Tripura*[8]		
21. *Meghalaya*[8]		
22. *Sikkim*[9]		
23. *Mizoram*[15]		
24. *Arunachal Pradesh*[15]		
25. *Goa*[16]		
26. *Chhattisgarh*[18]		
27. *Uttarakhand*[19]		
28. *Jharkhand*[20]		

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[1] The capital cities are: Andaman and Nicobar Islands—Port Blair; Andhra Pradesh—Hyderabad; Arunachal Pradesh—Itanagar; Assam—Dispur; Bihar—

Patna; Chandigarh—Chandigarh; Chhatisgarh—Raipur; Dadra and Nagar Haveli—Silvassa; Daman and Diu—Daman; Delhi—Delhi; Goa—Panaji; Gujarat—Gandhinagar; Haryana—Chandigarh; Himachal Pradesh—Simla; Jammu and Kashmir—Srinagar; Jharkhand—Ranchi; Karnataka—Bangalore; Kerala—Trivandrum; Lakshadweep—Kavaratti; Madhya Pradesh—Bhopal; Maharashtra—Mumbai; Manipur—Imphal; Meghalaya—Shillong; Mizoram—Aizwal; Nagaland—Kohima; Orissa—Bhubaneswar; Pondicherry—Pondicherry; Punjab—Chandigarh; Rajasthan—Jaipur; Sikkim—Gangtok; Tamil Nadu—Madras; Tripura—Agartala; Uttar Pradesh—Lucknow; Uttaranchal—Dehra Dun; West Bengal—Calcutta.

2. Substituted for Bombay by the Bombay Reorganisation Act (11 of 1960).
3. The name of 'Madras' changed to 'Tamil Nadu' by the Madras State (Alteration of Name) Act, 1968.
4. Mysore changed its name to 'Karnataka' under the Mysore State (Alteration of Name) Act, 1973.
5. Inserted by the State of Nagaland Act, 1962.
6. Inserted by the Punjab Reorganisation Act, 1966.
7. Inserted by the State of Himachal Pradesh Act, 1970.
8. Manipur, Tripura and Meghalaya were added by the N.E. Areas (Reorganisation) Act, 1971.
9. Sikkim was added by the Constitution (36th Amendment) Act, 1975.
10. The Laccadive, Minicoy and Amindivi Islands were renamed 'Lakshadweep', by the Laccadive, Minicoy and Amindivi Islands (Alteration of Name) Act, 1973.
11. Inserted by the Constitution (10th Amendment) Act, 1961.
12. Inserted by the Constitution (12th Amendment) Act, 1962 and amended by Act 18 of 1987.
13. Inserted by the Constitution (14th Amendment) Act, 1962. Substituted by the Pondicherry (Alteration of Name) Act, 2006, s. 4, for "Pondicherry" (w.e.f. 1.10.2006).
14. Inserted by the Constitution (12th Amendment) Act, 1962, with effect from 20-12-1961.
15. Mizoram was elevated to the status of a State—by the State of Mizoram Act, 1986, w.e.f. 14-8-1986; and Arunachal Pradesh has similarly been elevated from the status of Union Territory to statehood, by the State of Arunachal Pradesh Act, 1986.
16. Goa was made a State by the Goa, Daman and Diu Reorganisation Act, 1987.
17. Delhi, which was no. 1 in the list of Union Territories in Part II of Sch. I of the Constitution, has been called the 'National Capital Territory of Delhi' by the Constitution (69th Amendment) Act, 1991, by inserting Art. 239AA-239AB in the Constitution, w.e.f. 1-2-1992. Though it is still retained in the category of a Union Territory, it has been given a special status—having a Legislative Assembly and a Council of Ministers to advise the Lieutenant Governor (similar to that in a State), but the Legislative Assembly shall have no power to make laws with regard to Public Order, Police and Land, though they are specified in Entires 1, 2 and 18 of List II of 7th Sch. The legislative power relating to those subjects shall belong to the *Union Parliament*.
18. Added by The Madhya Pradesh Reorganisation Act, 2000, s. 5 (w.e.f. 1-11-2000).
19. Added by The Uttar Pradesh Reorganisation Act, 2000, s. 5 (w.e.f. 9-11-2000). Substituted by the Uttaranchal (Alteration of Name) Act, 2006, s. 5 for "Uttaranchal".
20. Added by The Bihar Reorganisation Act, 2000, s. 5 (w.e.f. 15-11-2000).

TABLE IV
THE CONSTITUTION AMENDMENT ACTS

Sl. No.	Act	Date of assent by President	Date of commencement	Whether ratified by more than half of State Legislatures, as required by the Proviso to Art. 368	Amendment made
1.	The Constitution (First Amendment) Act, 1951	18-6-1951	18-6-1951 (retrospective in Part)		Articles amended—15, 19, 85, 87, 174, 176, 341, 342, 376. Articles inserted—31A, 31B. Schedule added—Ninth.
2.	The Constitution (Second Amendment) Act, 1952	1-5-1953	1-5-1953	Since the Amendment Bill sought to make a change in the representation of States in Parliament, it had to be referred to the Legislatures of the States in Parts A and B for their ratification. The Bill was accordingly passed in Parliament on 19-12-1952, and then referred to the States. On receiving the ratification of not less than one-half of the State Legislatures, the President gave his assent on 1-5-1953.	Article amended—81.
3.	The Constitution (Third Amendment) Act, 1954	22-2-1955	22-2-1955	The Bill was passed by Parliament on 28-9-1954. Since the Bill sought to amend a List of the Seventh Schedule, it required ratification by the Legislatures of not less than one-half of the States specified in Parts A and B of the First Schedule. After having received such ratification, the President gave his assent on 22-2-1955.	Schedule amended—Seventh Schedule—List III, Entry 33.
4.	The Constitution (Fourth Amendment) Act, 1955	27-4-1955	27-4-1955	. . . . . .	Articles amended—31, 31A, 305. Schedule amended—Ninth.
5.	The Constitution (Fifth Amendment) Act, 1955	24-12-1955	24-12-1955	. . . . . .	Article amended—3.
6.	The Constitution (Sixth Amendment) Act, 1956	11-9-1956	11-9-1956	The Bill was passed by Parliament on 31-5-1956. It required ratification by not less than half	Articles amended—269, 286. Schedule amended—Seventh Schedule

TABLE IV — *Contd.*

Sl. No.	Act	Date of assent by President	Date of commen- cement	Whether ratified by more than half of State Legislatures, as required by the Proviso to Art. 368	Amendment made
				of the State Legislatures because it sought to amend the Legislative Lists. Having received such ratification the Bill was assented to by the President on 11-9-1956.	—List II, Entry 54; List I, Entry 92A *inserted.*
7.	The Constitution (Seventh Amendment) Act, 1956	19-10-1956	1-11-1956	For obvious reasons, this Bill required ratification. Hence, it was referred to the State Legislatures, having been passed by Parliament on 11-9-1956. After obtaining the required ratification, the President gave his assent.	Articles amended—49, 80, 81, 82, 131, 153, 158, 168, 170, 171, 216, 217, 220, 222, 224, 230, 231, 232, 239, 240, 298, 371. Articles inserted—258, 290A, 350A, 350B, 372A, 378A. Schedules amended—First, Second, Fourth, Seventh—List I, Entries 32, 67; List II, Entries 12, 24; List III, Entry 40. Articles omitted—238, 242, 243, 259, 278, 306, 379-391. Schedule omitted—Second, Part B. Consequential amendments in numerous provisions.
8.	The Constitution (Eighth Amendment) Act, 1959	5-1-1960	5-1-1960	. . .	Article 334 amended—'20 years' substituted for '10 years'.
9.	The Constitution (Ninth Amendment) Act, 1960	28-12-1960	17-1-1961	Views of the Legislature of the State of W.B. ascertained, under Art. 3, but ratification was not required as mere territorial change was not a matter specified in the Proviso to Art. 368.	First Schedule amended—to transfer certain territories from the States of Assam, Punjab, West Bengal and the Union Territory of Tripura to Pakistan, implementing the Indo-Pakistan agreements of different dates.

10.	*The Constitution (Tenth Amendment) Act, 1961*	16-8-1961	11-8-1961 (with retrospective effect)				Article 240 and First Schedule amended—to incorporate Dadra and Nagar Haveli as a Union Territory.
11.	The Constitution (Eleventh Amendment) Act, 1961	19-12-1961	19-12-1961	. . .		. . .	Articles 66(1) and 71(3)—to narrow down grounds for challenging validity of election of President or Vice-President.
12.	The Constitution (Twelfth Amendment) Act, 1962	27-3-1962	20-12-1961 (retrospectively).	. . .		. . .	Article 240 and First Schedule amended—to incorporate Goa, Daman and Diu as a Union Territory.
13.	The Constitution (Thirteenth Amendment) Act, 1962	28-12-1962	1-12-1963		Yes.		Article 371A inserted—to make special provisions for the administration of the State of Nagaland.
14.	The Constitution (Fourteenth Amendment) Act, 1962	28-12-1962	28-12-1962 But ss. 3 & 5 (a) came into force on 16-8-1962 (retrospectively).		Yes.		Provided that Pondicherry, Karaikal, Mahe and Yanam, the former French territories, should be specified in the Constitution as the Union Territory of Pondicherry. Enabled the Union Territories of Himachal Pradesh; Manipur, Tripura; Goa, Daman and Diu and Pondicherry to have Legislatures and Councils of Ministers on the same pattern as in some of the Part C States before the States' reorganisation. The Act also provided that the maximum representation for Union Territories in the Lok Sabha should be raised from 20 to 25, to enable the Union Territory of Pondicherry to be represented adequately.
15.	The Constitution (Fifteenth Amendment) Act, 1963	5-10-1963	5-10-1963		Yes.		Amends a number of Arts. 124, 128, 217, 222, 224, 224A, 226, 297, 311, 316, Entry 78, List I. The more important of these changes are—the raising of the age of retirement of a High Court Judge

TABLE IV — *Contd.*

Sl. No.	Act	Date of assent by President	Date of commencement	Whether ratified by more than half of State Legislatures, as required by the Proviso to Art. 368	Amendment made
					from 60 to 62; the extension of the jurisdiction of a High Court to issue writs under Art. 226 to a Government or authority situated outside its territorial jurisdiction where the cause of action arises within such jurisdiction; modifying the procedure imposed by Art. 311 upon the pleasure of the President or Governor to dismiss a civil servant.
16.	The Constitution (Sixteenth Amendment) Act, 1963	5-10-1963	5-10-1963	Yes.	Amends Art. 19 to enable Parliament to make laws providing restrictions upon the freedom of expression questioning the sovereignty or integrity of the Union of India, with consequential changes in Arts. 84, 173, Third Schedule.
17.	The Constitution (Seventeenth Amendment) Act, 1964	20-6-1964	20-6-1964	. . . . . .	Amends Art. 31A (definition of 'estate' amended with retrospective effect); Entries 21—64 added to the Ninth Schedule.
18.	The Constitution (Eighteenth Amendment) Act, 1966	27-8-1966	27-8-1966	. . . . . .	Adding Explanations to Art. 3. Provision was made for the formation of two States, Punjab and Haryana, by reorganising Punjab on linguistic basis. The explanation added to Art. 3 was to clarify that the Parliament has the power to create a new State or Union Territory.

19.	*The Constitution (Nineteenth Amendment) Act, 1966*	*11-12-1966*	*11-12-1966*	. . .	. . .	Amending Art. 324 to clarify the duties of the Election Commission.
20.	The Constitution (Twentieth Amendment) Act, 1966	22-12-1966	22-12-1966	. . .	. . .	Art. 233A inserted to validate the appointment of District Judges.
21.	The Constitution (Twenty-first Amendment) Act, 1967	10-4-1967	10-4-1967	. . .	. . .	Includes 'Sindhi' in the List of Languages in the Eighth Schedule.
22.	The Constitution (Twenty-second Amendment) Act, 1969	25-9-1969	25-9-1969	Yes.		Inserts Arts. 244A, 371B and Cl. (1A) in Art. 275, to constitute an autonomous State within the State of Assam (Meghalaya) comprising certain areas specified in Part A of the Sixth Schedule.
23.	The Constitution (Twenty-third Amendment) Act, 1970	23-1-1970	23-1-1970	Yes.		Amending Arts. 330, 332, 333, 334 (to extend the period of reservation for Scheduled Castes and Tribes).
24.	The Constitution (Twenty-fourth Amendment) Act, 1971	5-11-1971	5-11-1971	Yes.		Inserting Cl. (4) in Art. 13; amending Art. 368. The object of the amendment was to clarify that the Parliament has the power to amend every part of the Constitution. The intention was to wipe out the effect of *Golak Nath*. After this amendment the President is bound to assent to a Constitution Amendment Bill.
25.	The Constitution (Twenty-fifth Amendment) Act, 1971	20-4-1972	20-4-1972	Yes.		Clause (2) of Art. 31 amended and Cl. (2A) inserted, Art. 31C inserted. The jurisdiction of the Courts to determine the adequacy of compensation on acquisition of property was taken away. A new Clause was added to lay down that no law which declared that it was for giving effect to the principles specified in Cls. (b) and (c) of Art. 39

TABLE IV — *Contd.*

Sl. No.	Act	Date of assent by President	Date of commencement	Whether ratified by more than half of State Legislatures, as required by the Proviso to Art. 368	Amendment made
					would be called in question on the ground that it is inconsistent with the fundamental rights.
26.	The Constitution (Twenty-sixth Amendment) Act, 1971	28-12-1971	28-12-1971	... ...	Omitting Arts. 291, 362; inserting Art. 363A; amending Art. 366(22). The recognition to the Rulers of Princely States was withdrawn and their privy purses were abolished.
27.	The Constitution (Twenty-seventh Amendment) Act, 1971	30-12-1971	s. 3 from 30-12-1971, rest from 15-2-1972	... ...	Amending Art. 239A; inserting Art. 239B; amending Art. 240; inserting Art. 371C. Two new Union Territories *viz.* Mizoram and Arunachal Pradesh, were formed.
28.	The Constitution (Twenty-eighth Amendment) Act, 1972	27-8-1972	29-8-1972	... ...	Inserting Art. 312A; omitting Art. 314. The conditions of service and privileges of former Indian Civil Service officers were abolished.
29.	The Constitution (Twenty-ninth Amendment) Act, 1972	9-6-1972	9-6-1972	... ...	Adding items 65-66 to the Ninth Schedule. Two Kerala Acts pertaining to land reforms were included in the Ninth Schedule.
30.	The Constitution (Thirtieth Amendment) Act, 1972	22-2-1973	27-2-1973	Yes.	Amending Art. 133(1). Appeals to the Supreme Court were curtailed. Only such appeals can be brought which involve a substantial question of Law.
31.	The Constitution (Thirty-first Amendment) Act, 1973	17-10-1973	17-10-1973	... ...	Amending Arts. 81, 330, 332. Elected seats in Lok Sabha increased from *525* to *545*.

32.	*The Constitution (Thirty-second Amendment) Act, 1973*	3-5-1974	1-7-1974	. . .	. . .	Amending Art. 371(1) and inserting Arts. 371D-371E; amending Entry 63 of List I, Seventh Schedule. The object was to include six provisions in regard to Andhra Pradesh.
33.	The Constitution (Thirty-third Amendment) Act, 1974	19-5-1974	19-5-1974	. . .	. . .	Amending Arts. 101, 190. It was provided that if a member of a State legislature or Parliament sends his resignation, the Chairman or Speaker would satisfy himself that it is voluntary and genuine.
34.	The Constitution (Thirty-fourth Amendment) Act, 1974	7-9-1974	7-9-1974		Yes.	Adding items 67-86 to the Ninth Schedule.
35.	The Constitution (Thirty-fifth Amendment) Act, 1974	22-2-1975	1-3-1975		Yes.	Inserting Art. 2A and amending Arts. 80-81; adding Tenth Schedule. Sikkim was made an associate State.
36.	The Constitution (Thirty-sixth Amendment) Act, 1975	16-5-1975	26-4-1975		Yes.	Omitting Art. 2A, Schedule X; adding item 22 to Schedule I; inserting Art. 371F; adding Entry 22 to Schedule IV. Sikkim was made a full fledged State.
37.	The Constitution (Thirty-seventh Amendment) Act, 1975	3-5-1975	3-5-1975	. . .	. . .	Amending Arts. 239A-240; repealing Tenth Schedule. Provision was made for a legislative Assembly and Council of Ministers for the Union Territory of Arunachal Pradesh.
38.	The Constitution (Thirty-eighth Amendment) Act, 1975				Yes.	Amending Arts. 123, 213, 239B, 352, 356, 359, 360. Declaration of Emergency by the President and promulgation of Ordinances by the President or Governor made issues over which the judiciary would not be able to exercise its power of review.

TABLE IV — *Contd.*

Sl. No.	Act	Date of assent by President	Date of commencement	Whether ratified by more than half of State Legislatures, as required by the Proviso to Art. 368	Amendment made
39.	The Constitution (Thirty-ninth Amendment) Act, 1975	1-8-1975 10-8-1975	1-8-1975 10-8-1975	Yes.	Amending Art. 71; inserting Art. 329A. Questions regarding elections of President, Vice-President, Prime Minister and Speaker of Lok Sabha taken out of the purview of the judiciary.
40.	The Constitution (Fortieth Amendment) Act, 1976	27-5-1976	27-5-1976	. . . . . .	Substituting Art. 297; adding Entries 125 to 188 to Schedule IX. It was provided that all lands, minerals etc. underlying the ocean within the territorial waters or the continental shelf or the exclusive economic zone of India shall vest in the Union. Power to determine the limits of territorial waters, continental shelf etc. was vested in the Parliament.
41.	The Constitution (Forty-first Amendment) Act, 1976	7-9-1976	7-9-1976	. . . . . .	Amending Art. 316. Upper age for members of State Public Service Commission raised from 60 to 62.
42.	The Constitution (Forty-second Amendment) Act, 1976	18-12-1976	Different dates, commencing from 3-1-1977, according to G.I. Notification of 3-1-1977	Yes.	Amending Preamble, Arts. 31C, 39, 55, 74, 77, 81, 82, 83, 100, 102, 105, 118, 145, 166, 170, 172, 189, 191, 194, 208, 217, 225, 227, 228, 311, 312, 330, 352, 353, 356, 357, 358, 359, 366, 368, 371F, Seventh Schedule; Substituting Arts. 103, 150, 192, 226; inserting Arts. 31D, 32A, 39A, 43A, 48A, 51A, 131A, 139, 144A, 226A, 228A, 257A, 323A, 323B.

					This amendment was almost a complete revision of the Constitution and many material changes were incorporated. It was enacted during an emergency. The next government that came into power in 1977 repealed most of the amendments.
43.	The Constitution (Forty-third Amendment) Act, 1977	13-4-1978	13-4-1978	Yes.	Omitting Arts. 31D, 32A, 131A, 144A; amending Art. 145. This amendment omitted many articles inserted by the 42nd Amendment Act. Some articles were changed.
44.	The Constitution (Forty-fourth Amendment) Act, 1978	30-4-1979	Different dates as notified by Central Government, for different provisions; 19-6-1979: Arts. 19, 30, 31, 31A, 31C, 74, 77, 83, 103, 105, 123, 150, 166, 194, 213, 217, 225, 227, 257A, 300A, 352, 356, 358, 359, 360, 361A.	Yes.	Omitting Arts. 19(1)(f), 31, 77(4), 123(4), 166(4), 213(4), 239B(4), 257A, 329A. Inserting Arts. 30(1A), 134A, 300A, 361A. Amending and substituting, Arts. 19(1), 22, 31A, 31C, 38, 71, 74, 83, 103, 105, 123, 132-134, 139A, 172, 192, 194, 217, 225, 226, 227, 329, 352, 356, 358, 359, 360, 361, 371F. Cancelling the amendments made by the 42nd Amendment Act to—Arts. 100, 102, 105, 118, 191, 194, 208. (6 clauses of the Bill were rejected by the Rajya Sabha). The changes made by the 42nd Amendment Act were repealed or altered and the Constitution was brought back in its original form. But the right to Property was taken away from the Chapter of Fundamental Rights and put as a new Art. 300A.

TABLE IV — *Contd.*

Sl. No.	Act	Date of assent by President	Date of commencement	Whether ratified by more than half of State Legislatures, as required by the Proviso to Art. 368	Amendment made
45.	The Constitution (Forty-fifth Amendment) Act, 1980	14-4-1980	25-1-1980	Yes.	Extending reservation under Art. 334 from 30 to 40 years.
46.	The Constitution (Forty-sixth Amendment) Act, 1982	2-2-1983	2-2-1983	. . . . . .	Amending Arts. 269, 286, 366, List I, relating to Sales Tax.
47.	The Constitution (Forty-seventh Amendment) Act, 1984	26-8-1984	26-8-1984	. . . . . .	Adding Entries 189-202, to the Ninth Schedule.
48.	The Constitution (Forty-eighth Amendment) Act, 1984	26-8-1984	26-8-1984	. . . . . .	Inserting Proviso to Cl. (5) of Art. 356 to extend Pesident's Rule in Punjab.
49.	The Constitution (Forty-ninth Amendment) Act, 1984	11-9-1984	1-4-1985	. . . . . .	Amending Art. 244, Fifth & Sixth Schedules. Sixth Schedule was made applicable to Tripura.
50.	The Constitution (Fiftieth Amendment) Act, 1984	11-9-1984	11-9-1984	. . . . . .	Substituting Art. 33. Its scope was enlarged and many other Forces were included in its ambit.
51.	The Constitution (Fifty-first Amendment) Act, 1984	. . .	16-6-1986	Yes.	Amending Arts. 330, 332.
52.	The Constitution (Fifty-second Amendment) Act, 1985	15-2-1985	1-3-1985	. . . . . .	Amending Arts. 101, 102, 190, 191; adding Tenth Schedule (anti-defection). It was declared that a member who defects from his party would become subject to disqualification.
53.	The Constitution (Fifty-third Amendment) Act, 1986	14-8-1986	14-8-1986	. . . . . .	Adding Art. 371G. Mizoram was made a State.

54.	The Constitution (Fifty-fourth Amendment) Act, 1986	. . .	1-4-1986	. . .	. . .	Amending Arts. 125, 221, Second Schedule. Appropriate provisions were made to increase the salary of the judges of the Supreme Court and High Courts.
55.	The Constitution (Fifty-fifth Amendment) Act, 1986	23-12-1986	20-2-1987	. . .	. . .	Inserting Art. 371-H. State of Arunachal Pradesh was formed.
56.	The Constitution (Fifty-sixth Amendment) Act, 1987	23-5-1987	30-5-1987	. . .	. . .	Inserting Art. 371-I. The Union Territory of Goa, Daman, Diu was divided. Goa was made a State and provision for a State assembly were inserted. Daman and Diu to be a Union Territory.
57.	The Constitution (Fifty-seventh Amendment) Act, 1987	15-9-1987	21-9-1987	. . .	. . .	Clause (3A) inserted in Art. 332. Articles 330 and 332 were amended to make provision for reservation of seats for Scheduled Tribes of Nagaland, Meghalaya, Mizoram and Arunachal Pradesh, in the Lok Sabha and in the legislative assemblies of Nagaland and Meghalaya.
58.	The Constitution (Fifty-eighth Amendment) Act, 1987	9-12-1987	9-12-1987	. . .	. . .	Inserting Art. 394A. The people had been demanding that the authoritative text of the Constitution should be published in Hindi. This amendment authorised the President to publish the authoritative text of the Constitution in Hindi.
59.	The Constitution (Fifty-ninth Amendment) Act, 1988	30-3-1988	30-3-1988	. . .	. . .	Inserting Art. 359A; Amending Art. 356. Art. 356 was amended to provide that the declaration of emergency may remain in operation up to 3 years. The amendment made in Art. 352 provided that

TABLE IV — *Contd.*

Sl. No.	Act	Date of assent by President	Date of commencement	Whether ratified by more than half of State Legislatures, as required by the Proviso to Art. 368	Amendment made
					the emergency with respect to Punjab shall operate only in that State.
60.	The Constitution (Sixtieth Amendment) Act, 1988	20-12-1988	20-12-1988	. . . . . .	Amending Art. 276, to increase the limit of profession-tax from Rs. 250 to Rs. 2,500.
61.	The Constitution (Sixty-first Amendment) Act, 1989	28-3-1989	28-3-1989	Yes.	Amending Art. 326, to reduce the voting age from 21 to 18 years.
62.	The Constitution (Sixty-second Amendment) Act, 1989	25-1-1990	20-12-1989	Yes.	Amending Art. 334, to increase the period of reservation of seats for Scheduled Castes and Tribes for 10 years *i.e.* upto the year 2000 A.D.
63.	The Constitution (Sixty-third Amendment) Act, 1989	6-1-1990	. . .	. . . . . .	Amending Art. 356 [omitting Proviso to Cl. (5) and omitting Art. 359A]. With regard to Punjab Cl. (5) was inserted in Art. 356 and a new Art. 359A had been added. Both of these were omitted. The Government intended to end the emergency in Punjab and this step was taken with that in view.
64.	The Constitution (Sixty-fourth Amendment) Act, 1990	6-4-1990	. . .	. . . . . .	Amending Art. 356. As normalcy could not be restored in Punjab, emergency was to be continued. For that necessary provision was made in Art. 356.
65.	The Constitution (Sixty-fifth Amendment) Act, 1990	7-6-1990	12-3-1992	. . . . . .	Amending Art. 338, to provide for a National Commission for Scheduled Castes and Scheduled Tribes. The

							Commission has been given wide powers.
66.	The Constitution (Sixty-sixth Amendment) Act, 1990	7-6-1990	. . .	. . .		. . .	Inserting Entries 203 to 257 in the Ninth Schedule.
67.	The Constitution (Sixty-seventh Amendment) Act, 1990	4-10-1990	. . .	. . .		. . .	Amending Art. 356, 3rd Proviso, Cl. (a) extending President's Rule in Punjab to 4 years.
68.	The Constitution (Sixty-eighth Amendment) Act, 1991	12-3-1991	. . .	. . .		. . .	Amending Art. 356, 3rd Proviso, Cl. (a), extending the period to 5 years.
69.	The Constitution (Sixty-ninth Amendment) Act, 1991	12-12-1991	1-2-1992	. . .		. . .	Inserting Arts. 239AA and 239AB, to provide for a legislative Assembly and Council of Ministers for the Union Territory of Delhi.
70.	The Constitution (Seventieth Amendment) Act, 1992	12-8-1992	s. 3 retrospectively from 21-12-1991 s. 2 from 12-8-1992		Yes.		Amending Arts. 54 and 368 to include Members of Legislative Assemblies of Union Territories of Delhi and Pondicherry in the electoral college.
71.	The Constitution (Seventy-first Amendment) Act, 1992	31-8-1992	31-8-1992	. . .		. . .	Inserting entries 7, 9, 11 and reinserting some entries in 8th Sch.
72.	The Constitution (Seventy-second Amendment) Act, 1992	5-12-1992	5-12-1992	. . .		. . .	Inserting Cl. (3B) in Art. 332.
73.	The Constitution (Seventy-third Amendment) Act, 1992	20-4-1993	24-4-1993		Yes.		Re. Panchayat [Inserting Part IX, containing Arts. 243, 243A to 243-O; Eleventh Sch.].
74.	The Constitution (Seventy-fourth Amendment) Act, 1992	20-4-1993	1-6-1993		Yes.		Re. Nagarpalika (Municipalities) [Inserting Part IXA, containing Arts. 243P to 243ZG; Twelfth Sch.].
75.	The Constitution (Seventy-fifth Amendment) Act, 1993	5-2-1994	15-5-1994		Yes.		Inserting sub-Cl. (h) in Art. 323 B(2).

TABLE IV — *Contd.*

Sl. No.	Act	Date of assent by President	Date of commencement	Whether ratified by more than half of State Legislatures, as required by the Proviso to Art. 368	Amendment made
76.	The Constitution (Seventy-sixth Amendment) Act, 1994	31-8-1994	31-8-1994	Yes.	Inserting entry 237A in the 9th Sch.
77.	The Constitution (Seventy-seventh Amendment) Act, 1995	17-6-1995	17-6-1995	. . . . . .	Inserting Cl. (4A) in Art. 16.
78.	The Constitution (Seventy-eighth Amendment) Act, 1995	30-8-1995	30-8-1995	. . . . . .	Further addition of 27 entries to the 9th Sch. to the Constitution.
79.	The Constitution (Seventy-Ninth Amendment) Act, 1999	21-1-2000	25-1-2000	Yes.	Substituting "sixty years" for the words "fifty years" in Art. 334.
80.	The Constitution (Eightieth Amendment) Act, 2000	9-6-2000	1-4-1996	. . . . . .	Substituting new clauses for Cls. (1) and (2) of Art. 269; new Article for Art. 270 and omitting Art. 272.
81.	The Constitution (Eighty-First Amendment) Act, 2000	9-6-2000	. . .	. . . . . .	Inserting Cl. (4B) in Art. 16.
82.	The Constitution (Eighty-Second Amendment) Act, 2000	8-9-2000	. . .	. . . . . .	Inserting a Proviso to Art. 335.
83.	The Constitution (Eighty-Third Amendment) Act, 2000	8-9-2000	. . .	. . . . . .	Inserting Cl. (3A) in Art. 243M.
84.	The Constitution (Eighty-fourth Amendment) Act, 2001	21.2.2002	21.2.2002	Yes	Substitution of the figure "2026" relating to census in Arts. 55, 81, 82, 170, 330 and 332 for the figure "2000".
85.	The Constitution (Eighty-fifth Amendment) Act, 2001	4.1.2002	17.6.1995	. . . . . .	Substitution of certain words in Art. 16(4A) to protect consequential seniority of reserved category retrospectively.

86.	The Constitution (Eighty-sixth Amendment) Act, 2002	12.12.2002	. . .	. . .	. . .	Insertion of Art. 21A, substitution of Art. 45 and insertion of Art. 51A(k).
87.	The Constitution (Eighty-seventh Amendment) Act, 2003	22.6.2003	22.6.2003	. . .	. . .	Substitution of the figure "2001" relating to census in Arts. 81, 82, 170 and 330 for the figure "1991".
88.	The Constitution (Eighty-eighth Amendment) Act, 2003	8.5.2003	. . .	. . .	. . .	Insertion of Art. 268A, substitution of the words, figures and letter "Articles 268, 268A and 269" for the words and figures "Articles 268 and 269" in Art. 270 and insertion of Entry "92C" in Union List.
89.	The Constitution (Eighty-ninth Amendment) Act, 2003	28.9.2003	19.2.2004	. . .	. . .	Amendment of Art. 338 and insertion of Art. 338A.
90.	The Constitution (Ninetieth Amendment) Act, 2003	28.9.2003	28.9.2003	. . .	. . .	Insertion of a proviso to Art. 332(6).
91.	The Constitution (Ninety-first Amendment) Act, 2003	1.1.2004	1.1.2004	. . .	. . .	Amendment of Arts. 75, 164 and Sch. X, insertion of Art. 361B.
92.	The Constitution (Ninety-second Amendment) Act, 2003	7.1.2004	. . .	. . .	. . .	Addition of "Bodo", "Dogri", "Maithilli" and "Santhali" languages in Sch. VIII.
93.	The Constitution (Ninety-third Amendment) Act, 2005	20.1.2006	20.1.2006	. . .	. . .	Insertion of cl. (5) in Art. 15.
94.	The Constitution (Ninety-fourth Amendment), 2006	12.6.2006	. . .	. . .	. . .	Amendment of Art. 164.

TABLE V
FUNDAMENTAL RIGHTS

Right to Equality	*Right to Freedom*	*Right against Exploitation*	*Right to Freedom of Religion*	*Cultural and Educational Rights*	*Right to Property*[1]	*Right to Constitutional Remedies*
1. Equality before law and Equal protection before law [Art. 14]. 2. Prohibition of discrimination on ground of religion etc. [Art. 15]. 3. Equality of opportunity in employment [Art. 16]. 4. Abolition of untouchability [Art. 17]. 5. Abolition of titles [Art. 18].	1. Freedom of speech and expression; assembly; association; movement; residence and settlement; ....[1] profession [Art. 19]. 2. Protection in respect of conviction for offences [Art. 20]. 3. Protection of life and personal liberty [Art. 21]. 4. Right to education [Art. 21A].[1] 5. Protection against arrest and detention in certain cases [Art. 22].	1. Prohibition of traffic in human beings and forced labour [Art. 23]. 2. Prohibition of employment of children in hazardous employment [Art. 24].	1. Freedom of conscience and free profession [Art. 25]. 2. Freedom to manage religious affairs [Art. 26]. 3. Freedom as to payment of taxes for promotion of any particular religion [Art. 27]. 4. Freedom as to attendance at religious instruction in certain educational institutions [Art. 28].	1. Protection of language, script or culture of minorities [Art. 29]. 2. Right of minorities to establish and administer educational institutions [Art. 30].		Remedies for enforcement of the fundamental rights conferred by this Part,—writs of *habeas corpus, mandamus*, prohibition, *certiorari* and *quo warranto* [Art. 32].

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[1] Right to property omitted from Part III of the Constitution, by the Constitution (44th Amendment) Act, 1978.

[1] Inserted by the Constitution (Eighty-sixth Amendment) Act, 2002, S. 2.

TABLE VI
DIRECTIVE PRINCIPLES OF STATE POLICY

Directives in the Nature of Ideals of the State:

1. The State shall strive to promote the welfare of the people by securing a social order permeated by social, economic and political justice [Art. 38(1)]; *to minimise inequality in income, status, facilities and opportunities, amongst individuals and groups* [Art. 38(2)].[1]
2. The State shall endeavour to secure just and human conditions of work, a living wage, a decent standard of living and social and cultural opportunities for all workers [Art. 43].
3. The State shall endeavour to raise the level of nutrition and standard of living and to improve public health [Art. 47].
4. The State shall direct its policy towards securing equitable distribution of the material resources of the community and prevention of concentration of wealth and means of production [Art. 39(b)-(c)].
5. The State shall endeavour to promote international peace and amity [Art. 51].

Directives Shaping the Policy of the States:

1. To establish economic democracy and justice by securing certain economic rights (to be enumerated in the next column).
2. To secure a uniform civil code for the citizens [Art. 44].
3. To provide free and compulsory primary education [Art. 45].
4. To prohibit consumption of liquor and intoxicating drugs except for medical purposes [Art. 47].
5. To develop cottage industries [Art. 43].
6. To organise agriculture and animal husbandry on modern lines [Art. 48].
7. To prevent slaughter of useful cattle, *i.e.*, cows, calves, and other milch and draught cattle [Art. 48].
8. To organise Village Panchayats as units of self-government [Art. 40].
9. To promote educational and economic interests of weaker sections and to protect them from social injustice [Art. 46].
10. *To protect and improve the environment and to safeguard forests and wild life* [Art. 48A][2]
11. To protect and maintain places of historic or artistic interest [Art. 49].
12. To separate the judiciary from the Executive [Art. 50].

Non-justiciable Rights of Citizens:

1. Right to adequate means of livelihood [Art. 39(a)].
2. Right of both sexes to equal pay for equal work [Art. 39(d)].
3. Right against economic exploitation [Art. 39(e)-(f)].
4. *Right of children and the young to be protected against exploitation and to opportunities for healthy development, consonant with freedom and dignity* [Art. 39(f)].[2]
5. *Right to equal opportunity for justice and free legal aid* [Art. 39A].[2]
6. Right to work [Art. 41].
7. Right to public assistance in case of unemployment, old age, sickness and other cases of undeserved want [Art. 41].
8. Right to humane conditions of work and maternity relief [Art. 42].
9. Right to a living wage and conditions of work ensuring decent standard of life for workers [Art. 43].
10. *Right of workers to participate in management of industries* [Art. 43A].[2]
11. Right of children to free and compulsory education [Art. 45].

---

[1] Added by the 44th Amendment Act, 1978.

[2] Added by the 42nd Amendment Act, 1976.

TABLE VII

FUNDAMENTAL DUTIES OF CITIZENS[1]

(a) To abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;

(b) to cherish and follow the noble ideals which inspired our national struggle for freedom;

(c) to uphold and protect the sovereignty, unity and integrity of India;

(d) to defend the country and render national service when called upon to do so;

(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

(f) to value and preserve the rich heritage of our composite culture;

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;

(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;

(i) to safeguard public property and to abjure violence;

(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

[2](k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

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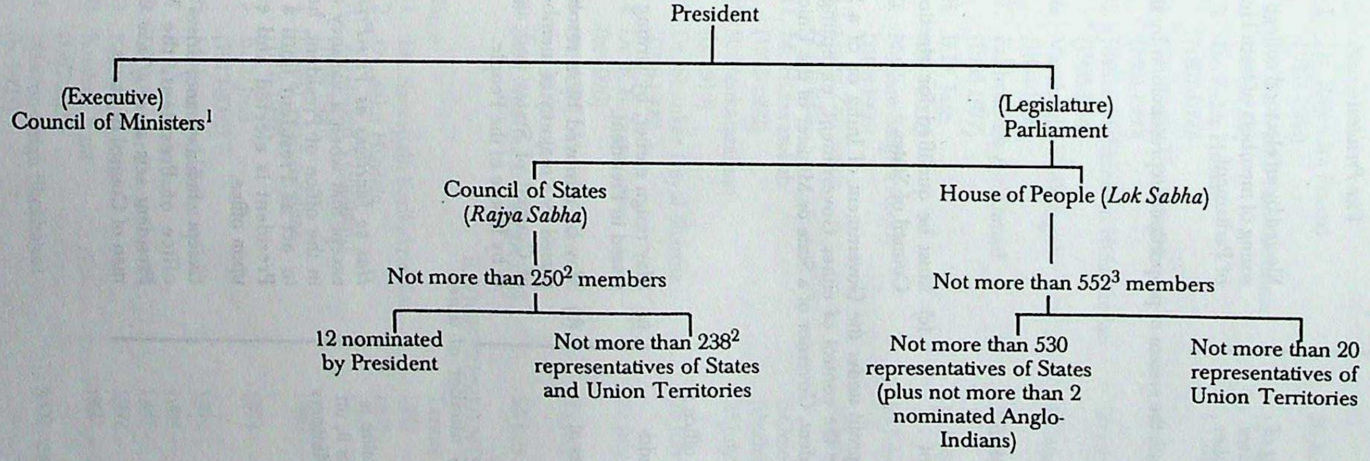
1. Added by the Constitution (42nd Amendment) Act, 1976.
2. Inserted by the Constitution (Eighty-sixth Amendment) Act, 2002.

TABLE VIII
GOVERNMENT OF THE UNION


President
(Executive)
Council of Ministers[1]
(Legislature)
Parliament
Council of States
(*Rajya Sabha*)
House of People (*Lok Sabha*)
Not more than 250[2] members
Not more than 552[3] members
12 nominated by President
Not more than 238[2] representatives of States and Union Territories
Not more than 530 representatives of States (plus not more than 2 nominated Anglo-Indians)
Not more than 20 representatives of Union Territories

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1. On 25.10.2007 there were in the Council of Ministers—
   (a) 32 Ministers of the Cabinet, including the Prime Minister;
   (b) 47 Ministers of State; and
2. On 25.10.2007, the actual number of Members of the Council of States was 245, of whom 233 were representatives of the States and Union Territories, and 12 nominated by the President (see Table XI).
3. On 25.10.2007, the actual number of seats in the House of the People was 545, consisting of—
   530 representatives of States (including 6 from Jammu and Kashmir).
   3 representatives of Union Territories of Delhi; Pondicherry; Chandigarh; Andaman and Nicobar Islands, Lakshadweep, Dadra and Nagar Haveli; Daman and Diu.
   2 nominated Anglo-Indians.

TABLE IX

OFFICES OF PRESIDENT AND VICE-PRESIDENT COMPARED

President	*Vice-President*
Election :	
Elected by electoral college consisting of the elected members of (a) both Houses of Parliament; (b) Legislative Assemblies of States.	Elected by an electoral college consisting of members of both Houses of Parliament.
Both elections to be in accordance with the system of proportional representation by single transferable vote.	
Qualifications for Election :	
(a) Must be a citizen of India;	
(b) Must have completed the age of 35 years; and	
(c) Must be qualified for election of House of the People.	(c) Must be qualified for election to Council of States.
(d) Must not hold any office of profit under the Government of India or of a State or any other authority under the control of either Government, excepting the offices of President, Vice-President, Governor of a State or Minister of the Union or of a State.	
Term of Office :	
Five years from the date of entering office :	
(a) May resign earlier, by writing addressed to Vice-President.	(a) May resign earlier, by writing addressed to President.
(b) May be removed by the process of impeachment.	(b) May be removed by a resolution passed by a majority of members of Council of States and agreed to by House of the People.
Both eligible for re-election, any number of times.	
Functions :	
The executive power in the Union is vested in him, and he exercises it, on the advice of the Council of Ministers of the Union.	*Has no functions as Vice-President* except that when a vacancy arises in the office of President, he has to act as President until a new President is elected and enters upon office. Except when a vacancy arises in office of President, the Vice-President acts as *ex-officio* Chairman of Council of States.

TABLE X

A. PRESIDENTS OF INDIA

	Name	Tenure
1.	Dr. Rajendra Prasad (1884-1963)	26 January 1950 — 13 May 1962
2.	Dr. Sarvepalli Radhakrishnan (1888-1975)	13 May 1962 — 13 May 1967
3.	Dr. Zakir Hussain (1897-1969)	13 May 1967 — 3 May 1969 (died)
4.	Varahagiri Venkatagiri (1884-1980)	3 May 1969 — 20 July 1969 (Acting)
5.	Justice Mohammad Hidayatullah (1905-1992)	20 July 1969 — 24 August 1969 (Acting)
6.	Varahagiri Venkatagiri (1894-1980)	24 August 1969 — 24 August 1974
7.	Fakhruddin Ali Ahmed (1905-1977)	24 August 1974 — 11 February 1977 (died)
8.	B.D. Jatti (1913-2002)	11 February 1977 — 25 July 1977 (Acting)
9.	Neelam Sanjiva Reddy (1913-1996)	25 July 1977 — 25 July 1982
10.	Giani Zail Singh (1916-1994)	25 July 1982 — 25 July 1987
11.	M. Hidayatullah (1905-1992)	6 October 1982 — 31 October 1982 (discharged the functions of the President)
12.	R. Venkataraman (b. 1910)	25 July 1987 — 25 July 1992
13.	Dr. Shanker Dayal Sharma (1918-1999)	25 July 1992 — 25 July 1997
14.	Dr. K.R. Narayanan (b. 1920)	25 July 1997 — 25 July 2002
15.	Dr. A.P.J. Abdul Kalam (b. 1931).	25 July 2002 — 25 July 2007
16.	Smt. Pratibha Devisingh Patil	25 July 2007 - till date

B. VICE-PRESIDENTS OF INDIA

	Name	Tenure
1.	Dr. Sarvepalli Radhakrishnan	1952 — 1962
2.	Dr. Zakir Hussain	1962 — 1967
3.	Varahagiri Venkatagiri (1894-1980)	1967 — 1969
4.	Gopal Swarup Pathak (1896-1982)	1969 — 1974
5.	B.D. Jatti (1913-2002)	1974 — 1979
6.	Mohammad Hidayatullah	1979 — 1984
7.	R. Venkataraman	1984 — 1987
8.	Dr. Shanker Dayal Sharma	1987 — 1992
9.	K.R. Narayanan	1992 — 1997
10.	Krishan Kant (1927-2002)	1997 — 2002
11.	Bhairon Singh Shekhawat (b. 1923)	2002 - 2007
12.	Mohammad Hamid Ansari (b. 1937)	Aug. 10, 2007 - till date

C. PRIME MINISTERS OF INDIA

Name	Tenure
1. Jawaharlal Nehru (1889-1964)	15 August 1947 — 27 May 1964 (died)
2. Gulzari Lal Nanda (1898-1997)	27 May 1964 — 9 June 1964 (Acting)
3. Lal Bahadur Shastri (1904-1966)	9 June 1964 — 11 January 1966 (died)
4. Gulzari Lal Nanda (1898-1997)	11 January 1966 — 24 January 1966 (Acting)
5. Indira Gandhi (1917-1984)	24 January 1966 — 24 March 1977
6. Morarji Desai (1896-1995)	24 March 1977 — 28 July 1979
7. Charan Singh (1902-1987)	28 July 1979 — 14 January 1980
8. Indira Gandhi (1917-1984)	14 January 1980 — 31 October 1984 (died)
9. Rajiv Gandhi (1944-1991)	31 October 1984 — 1 December 1989
10. Vishwanath Pratap Singh (b. 1931)	2 December 1989 — 10 November 1990
11. Chandra Shekhar (1927-2007)	10 November 1990 — 21 June 1991
12. P.V. Narasimha Rao (1921-2004)	21 June 1991 — 16 May 1996
13. Atal Bihari Bajpayee (b. 1926)	16 May 1996 — 1 June 1996
14. H.D. Deve Gowda (b. 1933)	1 June 1996 — 20 April 1997
15. I.K. Gujral (b. 1919)	21 April 1997 — 18 March 1998
16. Atal Bihari Bajpayee (b. 1926)	19 March 1998 — 13 October 1999
17. Atal Bihari Bajpayee (b. 1926)	13 October 1999 — 22 May 2004
18. Dr. Manmohan Singh (b. 1932)	22 May 2004 — till date

TABLE XI

REPRESENTATION OF STATES AND UNION TERRITORIES IN THE COUNCIL OF STATES (RAJYA SABHA) (as on 31.07.2006)

States :	
Andhra Pradesh	*18*
Arunachal Pradesh	*1*
Assam	*7*
Bihar	*[16]*[1]
[2][*Chhattisgarh*	*5*]
Goa	*1*
Gujarat	*11*
Haryana	*5*
Himachal Pradesh	*3*
Jammu and Kashmir	*4*
[3][*Jharkhand*	*6*]
Karnataka	*12*
Kerala	*9*
Madhya Pradesh	*[11]*[4]
Maharashtra	*19*
Manipur	*1*
Meghalaya	*1*
Mizoram	*1*
Nagaland	*1*
Orissa	*10*
Punjab	*7*
Rajasthan	*10*
Sikkim	*1*
Tamil Nadu	*18*
Tripura	*1*
[5][*Uttarakhand*	*3*]
Uttar Pradesh	*[31]*[6]
West Bengal	*16*
Union Territories :	
Delhi	*3*
Puducherry[7]	*1*
Total	233[8]

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1. Substituted by The Bihar Reorganisation Act, 2000, s. 7.
2. Inserted by The Madhya Pradesh Reorganisation Act, 2000, s. 7.
3. Inserted by The Bihar Reorganisation Act, 2000, s. 7.
4. Substituted for "16" by The Madhya Pradesh Reorganisation Act, 2000, s. 7.
5. Inserted by The Uttar Pradesh Reorganisation Act, 2000, s. 7. Substituted by the Uttaranchal (Alteration of Name) Act, 2006, s. 5, for "Uttaranchal".
6. Substituted by The Uttar Pradesh Reorganisation Act, 2000, s. 7.
7. Substituted by the Pondicherry (Alteration of Name) Act, 2006, s. 4, for "Pondicherry" (w.e.f. 1.10.2006).
8. Plus 12 nominated by President = 245.

TABLE XII

ALLOCATION OF SEATS IN THE HOUSE OF PEOPLE

[*Vide* The Representation of the People (Amendment) Act, 2008, sec. 8]

Name of the State/ Union Territory	Total	Reserved for the Scheduled Castes	Reserved for the Scheduled Tribes
States:			
Andhra Pradesh	42	7	3
Arunachal Pradesh	2	—	—
Assam	14	1	2
Bihar	[40	6	—][1]
[2][Chhattisgarh	11	1	4]
Goa	2	—	—
Gujarat	26	2	4
Haryana	10	2	—
Himachal Pradesh	4	1	—
Jammu and Kashmir	6	—	—
[3][Jharkhand	14	1	5]
Karnataka	28	5	2
Kerala	20	2	—
Madhya Pradesh	[29	4	6][4]
Maharashtra	48	5	4
Manipur	2	—	1
Meghalaya	2	—	2
Mizoram	1	—	1
Nagaland	1	—	—
Orissa	21	3	5
Punjab	13	4	—
Rajasthan	25	4	3
Sikkim	1	—	—
Tamil Nadu	39	7	—
Tripura	2	—	1
[5][Uttarakhand	5	1	—]
Uttar Pradesh	[80	17	—][6]
West Bengal	42	10	2
Union Territories:			
Andaman and Nicobar Islands	1	—	—
Chandigarh	1	—	—
Dadra and Nagar Haveli	1	—	1
Daman and Diu	1	—	—
Delhi	7	1	—
Lakshadweep	1	—	1
Puducherry[7]	1	—	—
Total	543[8]	84	47

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1. *Vide* The Bihar Reorganisation Act, 2000, s. 9(a).
2. *Vide* The Madhya Pradesh Reorganisation Act, 2000, s. 9.
3. *Vide* The Bihar Reorganisation Act, 2000, s. 9(c).
4. *Vide* The Madhya Pradesh Reorganisation Act, 2000, s. 9.
5. *Vide* The Uttar Pradesh Reorganisation Act, 2000, s. 9. Substituted by the Uttaranchal (Alteration of Name) Act, 2006, s. 5, for "Uttaranchal".
6. *Vide* The Uttar Pradesh Reorganisation Act, 2000, s. 9.
7. Substituted by the Pondicherry (Alteration of Name) Act, 2006, s. 4, for "Pondicherry" (w.e.f. 1.10.2006).
8. Plus 2 Anglo-Indians Nominated by President = 545.

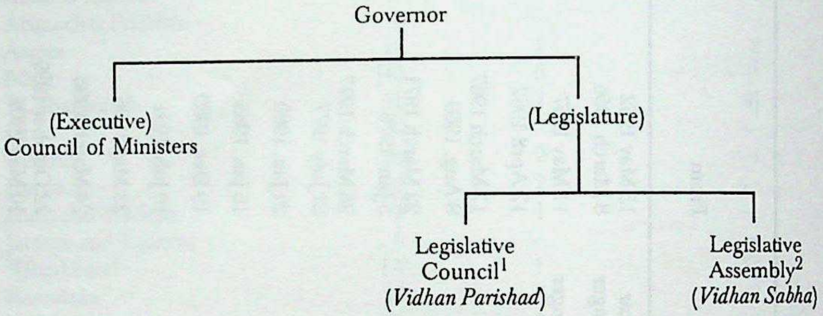
TABLE XIII

LOK SABHA AND ITS SPEAKER(S)

Lok Sabha			**Speaker(s)**		
	Date of first meeting after its constitution	Date of dissolution	Name	From	To
First Lok Sabha	13 May 1952	4 April 1957	Ganesh Vasudev Mavalankar M. Ananthasayanam Ayyanger	15 May 1952 8 March 1956	27 Feb. 1956 10 May 1957
Second Lok Sabha	10 May 1957	31 March 1962	M. Ananthasayanam Ayyanger	11 May 1957	6 April 1962
Third Lok Sabha	16 April 1962	3 March 1967	Hukam Singh	17 April 1962	16 March 1967
Fourth Lok Sabha	16 March 1967	27 Dec. 1970	Neelam Sanjiva Reddy Dr. Gurdial Singh Dhillon	17 March 1967 8 Aug. 1969	19 July 1969 19 March 1971
Fifth Lok Sabha	19 March 1971	18 Jan. 1977	Dr. Gurdial Singh Dhillon Bali Ram Bhagat	22 March 1971 5 Jan. 1976	1 Dec. 1975 25 March 1977
Sixth Lok Sabha	25 March 1977	22 Aug. 1979	Neelam Sanjiva Reddy K.D. Hegde	26 March 1977 21 July 1977	13 July 1977 21 Jan. 1980
Seventh Lok Sabha	21 Jan. 1980	31 Dec. 1984	Dr. Bal Ram Jakhar	22 Jan. 1980	15 Jan. 1985
Eighth Lok Sabha	15 Jan. 1985	27 Nov. 1989	Dr. Bal Ram Jakhar	16 Jan. 1985	18 Dec. 1989
Ninth Lok Sabha	18 Dec. 1989	13 March 1991	Rabi Ray	19 Dec. 1989	9 July 1991
Tenth Lok Sabha	9 July 1991	10 May 1996	Shivraj Patil	10 July 1991	22 May 1996
Eleventh Lok Sabha	22 May 1996	4 Dec. 1997	P.A. Sangma	23 May 1996	23 March 1998
Twelfth Lok Sabha	23 March 1998	26 April 1999	G.M.C. Balayogi	24 March 1998	20 October 1999
Thirteenth Lok Sabha	20 October 1999	6 February 2004	G.M.C. Balayogi Manohar Ganjan Joshi	22 October 1999 10 May 2002	3 March 2002. 2 June 2004
Fourteenth Lok Sabha	2 June 2004	–	Somnath Chatterjee	4 June 2004	till date

TABLE XIV

GOVERNMENT OF STATES


Governor
(Executive)
Council of Ministers
(Legislature)
Legislative Council[1]
(*Vidhan Parishad*)
Legislative Assembly[2]
(*Vidhan Sabha*)

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[1] The total number of seats in the States (including Jammu and Kashmir) which have a Legislative Council, is 453. [see Table XV].

[2] The total number of seats in the Legislative Assemblies of the States and Union Territories, is 4120. [see Table XV].

TABLE XV

MEMBERSHIP OF LEGISLATIVE ASSEMBLIES AND LEGISLATIVE COUNCILS

[*Vide* The Representation of the People (Amendment) Act, 2008, sec. 8]

	Legislative Assembly	*Legislative Council*
Andhra Pradesh	294	[90][1]
Arunachal Pradesh	*60*	Nil
Assam	126	Nil
Bihar	[2][243]	[75][3]
[4][Chhattisgarh	90	Nil]
Union Territory of Delhi	70	Nil
Goa	40	Nil
Gujarat	*182*	Nil
Haryana	*90*	Nil
Himachal Pradesh	68	Nil
Jammu and Kashmir	87	36
[5][Jharkhand	81	Nil]
Karnataka	*224*	*75*
Kerala	140	Nil
Madhya Pradesh	[230][6]	Nil
Maharashtra	*288*	*78*
Manipur	60	Nil
Meghalaya	*60*	Nil
Mizoram	40	Nil
Nagaland	*60*	Nil
Orissa	147	Nil
Punjab	117	Nil
Rajasthan	200	Nil
Sikkim	*32*	Nil
Tamil Nadu	*234*	Nil
Tripura	60	Nil
Union Territory of Puducherry[7]	30	Nil
[8][Uttarakhand	70	Nil]
Uttar Pradesh	[403][9]	[99][10]
West Bengal	294	Nil
	4,120	453

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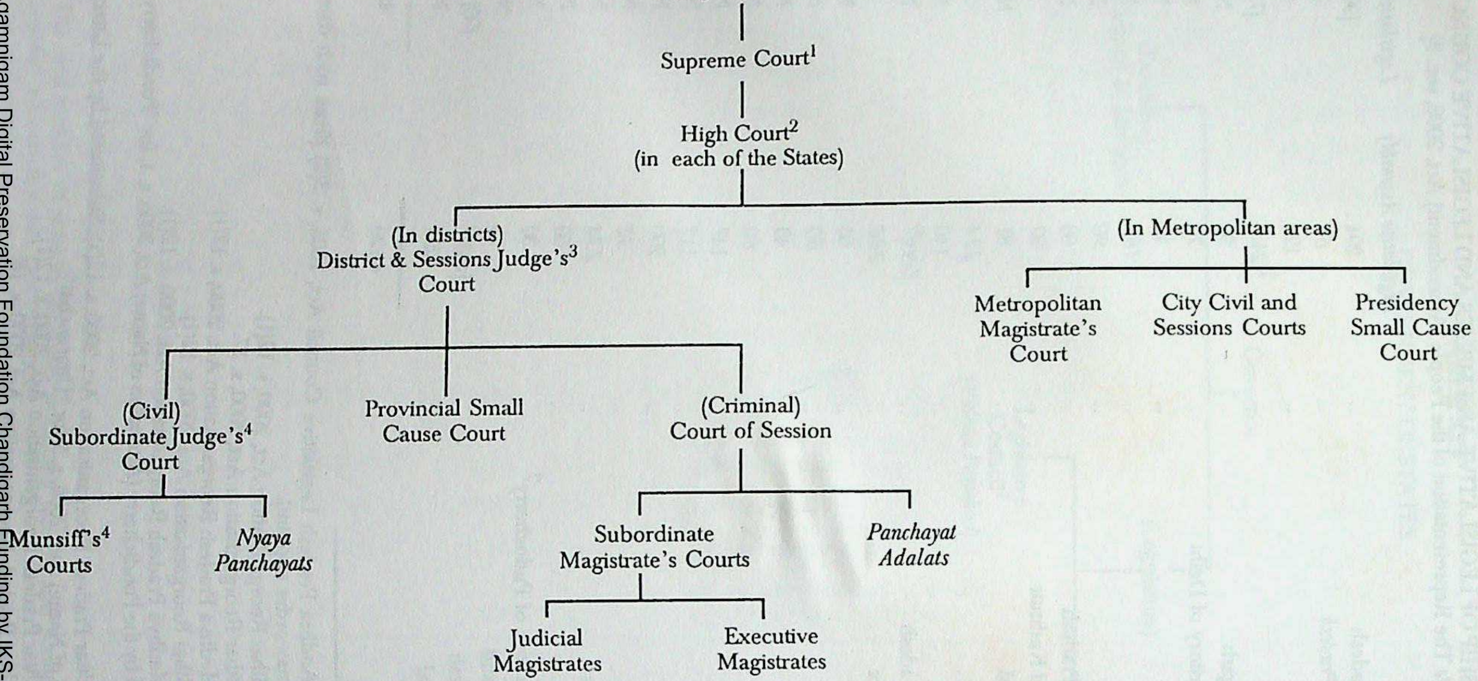
1. *Vide* The Andhra Pradesh Legislative Council Act, 2005, s. 3(2) [from such date as the President may order appoint].
2. *Vide* The Bihar Reorganisation Act, 2000, s. 12(1).
3. *Vide* The Bihar Reorganisation Act, 2000, s. 17.
4. *Vide* The Madhya Pradesh Reorganisation Act, 2000, s. 12(1).
5. *Vide* The Bihar Reorganisation Act, 2000, s. 12(1).
6. *Vide* The Madhya Pradesh Reorganisation Act, 2000, s. 12(1).
7. Substituted by the Pondicherry (Alteration of Name) Act, 2006, s. 4, for "Pondicherry" (w.e.f. 1.10.2006).
8. *Vide* The Uttar Pradesh Reorganisation Act, 2000, s. 12(1). Substituted by the Uttaranchal (Alteration of Name) Act, 2006, s. 5 for "Uttaranchal".
9. *Vide* The Uttar Pradesh Reorganisation Act, 2000, s. 12(1).
10. *Vide* The Uttar Pradesh Reorganisation Act, 2000, s. 18.

TABLE XVI
THE JUDICIARY


Supreme Court[1]
High Court[2] (in each of the States)
(In districts) District & Sessions Judge's[3] Court
(In Metropolitan areas)
Metropolitan Magistrate's Court
City Civil and Sessions Courts
Presidency Small Cause Court
(Civil) Subordinate Judge's[4] Court
Provincial Small Cause Court
(Criminal) Court of Session
Munsiff's[4] Courts
Nyaya Panchayats
Subordinate Magistrate's Courts
Panchayat Adalats
Judicial Magistrates
Executive Magistrates

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1. Chief Justice and 25 other Judges.
2. The total sanctioned strength of Judges and additional judges in different High Courts is 678 against of which 587 Judges were in position as on 26 June 2006. (*Vide India 2008, p. 592*)
3. At the end of 1996, there were about 2,067 (Present position is not available) District and Sessions Judges, and 1,376 (Present position is not available) Senior Civil Judges and Chief Judicial Magistrates.
4. At the end of 1996, there were about 4,307 (Present position is not available) Munsiffs/Subordinate Judges.

TABLE XVII

JURISDICTION AND SEATS OF HIGH COURTS

Name	Year of Establishment	Territorial Jurisdiction	Seat
Allahabad	1866	Uttar Pradesh	Allahabad (Bench at Lucknow)
Andhra Pradesh	1954	Andhra Pradesh	Hyderabad
Bombay	1862	Maharashtra, Dadra and Nagar Haveli and Goa, Daman and Diu	Bombay (Bench at Nagpur, Panaji and Aurangabad)
Calcutta	1862	West Bengal and Andaman and Nicobar Islands	Calcutta (Circuit bench at Port Blair)
Chhatisgarh	2000	Chhatisgarh	Bilaspur
Delhi	1966	Delhi	Delhi
Guwahati	1948	Assam, Manipur, Meghalaya, Nagaland, Tripura, Mizoram and Arunachal Pradesh	Guwahati (Bench at Kohima and Circuit benches at Imphal, Agartala and Shillong)
Gujarat	1960	Gujarat	Ahmedabad
Himachal Pradesh	1971	Himachal Pradesh	Shimla
Jammu and Kashmir	1957	Jammu and Kashmir	Srinagar and Jammu
Jharkhand	2000	Jharkhand	Ranchi
Karnataka	1884	Karnataka	Bangalore
Kerala	1956	Kerala and Lakshadweep	Ernakulam
Madhya Pradesh	1956	Madhya Pradesh	Jabalpur (Benches at Gwalior and Indore)
Madras	1862	Tamil Nadu and Pondicherry	Madras
Orissa	1948	Orissa	Cuttack
Patna	1916	Bihar	Patna (Bench at Ranchi)
Punjab and Haryana	1966	Punjab, Haryana and Chandigarh	Chandigarh
Rajasthan	1950	Rajasthan	Jodhpur (Bench at Jaipur)
Sikkim	1975	Sikkim	Gangtok
Uttarakhand[1]	2000	Uttarakhand	Nanital

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[1] Substituted by the Uttaranchal (Alteration of Name) Act, 2006, s. 4, for "Uttaranchal".

TABLE XVIII
TERRITORIAL JURISDICTION OF BENCHES OF CENTRAL ADMINISTRATIVE TRIBUNAL

Sl No.	Bench	Jurisdiction of the Bench
(1)	(2)	(3)
1.	Principal Bench (New Delhi)	National Capital Territory of Delhi
2.	Ahmedabad Bench	State of Gujarat
3.	Allahabad Bench	State of Uttar Pradesh excluding the District mentioned against serial Number 4 under the jurisdiction of Lucknow Bench
4.	Lucknow Bench	Districts of Lucknow, Hardoi, Kheri, Rai Barelli, Sitapur, Unnao, Faizabad, Baharaich, Barabanki, Gonda, Pratapgarh and Sultanpur in the State of Uttar Pradesh
5.	Bangalore Bench	State of Karnataka
6.	Calcutta Bench	States of Sikkim and West Bengal and Union Territory of Andaman and Nicobar Islands
7.	Chandigarh Bench	States of Jammu & Kashmir, Haryana, Himachal Pradesh and Punjab and the Union Territory of Chandigarh
8.	Cuttack Bench	State of Orissa
9.	Ernakulam Bench	State of Kerala and Union Territory of Lakhadweep
10.	Guwahati Bench	States of Assam, Manipur, Meghalaya, Nagaland and Tripura and the Union Territories of Arunachal Pradesh and Mizoram
11.	Hyderabad Bench	State of Andhra Pradesh
12.	Jabalpur Bench	State of Madhya Pradesh
13.	Jodhpur Bench	State of Rajasthan excluding the District mentioned against serial Number 14 under the jurisdiction of Jaipur Bench
14.	Jaipur Bench	Districts of Ajmer, Alwar, Baran, Bharatpur, Bundi, Dausb, Dholpur, Jaipur, Jhallawar, Jhunjhun, Kotah, Sawai-Madhopur, Sikar and Tonk in the State of Rajasthan
15.	Madras Bench	States of Tamil Nadu and the Union Territories of Pondicherry
16.	Bombay Bench	State of Maharashtra and Goa the Union Territories of Dadra and Nagar Haveli and, Daman and Diu.
17.	Panta Bench	State of Bihar

TABLE XIX

DISTRIBUTION OF LEGISLATIVE POWER

List I—Union List.

1. Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation.

2. Naval, military and air forces; any other armed forces of the Union.

2A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.

3. Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.

4. Naval, military and air force works.

5. Arms, firearms, ammunition and explosives.

6. Atomic energy and mineral resources necessary for its production.

7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.

8. Central Bureau of Intelligence and Investigation.

9. Preventive detention for reasons connected with Defence, Foreign Affairs or the security of India; persons subjected to such detention.

10. Foreign Affairs; all matters which bring the Union into relation with any foreign country.

11. Diplomatic, consular and trade representation.

List II—State List.

1. Public order (but not including the use of naval, military or air forces or any other armed forces of the Union in aid of civil power).

2. Police, including railway and village Police, subject to Entry 2A of List I.[1]

3. Officers and servants of the High Court; procedure in rent and revenue Courts; fees taken in all courts except the Supreme Court.

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other States for the use of prisons and other institutions.

5. Local government, that is to say, the constitution and powers of municipal corporation, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

6. Public health and sanitation, hospitals and dispensaries.

7. Pilgrimages, other than pilgrimages to places outside India.

8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

9. Relief of the disabled and unemployable.

10. Burials and burial grounds; cremations and cremation grounds.

11. *Omitted.*[1]

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[1] Entry 11 omitted by the Constitution (42nd Amendment) Act, 1976.

List III—Concurrent List.

1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.

3. Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.

4. Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in entry 3 of this List.

5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

6. Transfer of property other than agricultural land; registration of deeds and documents.

7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

TABLE XIX—*Contd.*

List I—Union List.

12. United Nations Organisation.

13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

15. War and peace.

16. Foreign jurisdiction.

17. Citizenship, naturalisation and aliens.

18. Extradition.

19. Admission into, and emigration and expulsion from India; passports and visas.

20. Pilgrimages to places outside India.

21. Piracies and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air.

22. Railways.

23. Highways declared by or under law made by Parliament to the national highways.

24. Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels; the rule of the road on such waterways.

25. Maritime shipping and navigation, including shipping and navigation on tidal waters; provision of education and training for the mercantile marine and regulation of such education and training provided by States and other agencies.

26. Lighthouses, including lightships, beacons and other provisions for the safety of shipping and aircraft.

27. Parts declared by or under law made by Parliament or existing law to be major ports, including

List II—State List.

12. Libraries, museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those declared *by* or *under law made by Parliament*[1] to be of national importance.

13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways, ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles.

14. Agriculture, including agricultural education and research, protection against pests and prevention of plant disceases.

15. Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice.

16. Pounds and the prevention of cattle trespass.

17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.

18. Land, that is to say, rights in or over land, and tenures including the relations of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvements and agricultural loans; colonisation.

19. *Omitted.*[2]

20. *Omitted.*[2]

List III—Concurrent List.

8. Actionable wrongs.

9. Bankruptcy and insolvency.

10. Trust and Trustees.

11. Administrators—general and official trustees.

11A. *Administration of justice, constitution and organisation of courts, except Supreme Court and High Courts.*[1]

12. Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings.

13. Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.

14. Contempt of Court, but not including contempt of the Supreme Court.

15. Vagrancy; nomadic and migratory tribes.

16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficients.

17. Prevention of cruelty to animals.

17A. *Forests.*[1]

17B. *Protection of wild animals and birds.*[1]

18. Adulteration of foodstuffs and other goods.

19. Drugs and poisons, subject to the provisions of entry 59 of the List I with respect to opium.

20. Economic and social planning.

20A. *Population control and family planning.*[1]

21. Commercial and industrial monopolies, combines and trusts.

22. Trade unions; industrial and labour disputes.

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[1] Substituted by the Constitution (7th Amendment) Act, 1956.

[2] Omitted by the Constitution (42nd Amendment) Act, 1976.

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[1] Inserted by the Constitution (42nd Amendment) Act, 1976.

their delimitation, and the constitution and powers of port authorities therein.

28. Port quarantine, including hospitals connected therewith; seamen's and marine hospitals.

29. Airways; aircraft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.

30. Carriage of passengers and goods by railways, sea or air, or by national waterways in mechanically propelled vessels.

31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

32. Property of the Union and the revenue therefrom, but as regards property situated in a State . . . subject to legislation by the State, save insofar as Parliament by law otherwise provides.

33. *Omitted.*[1]

34. Courts of wards for the estates of Rulers of Indian States.

35. Public debt of the Union.

36. Currency, coinage and legal tender; foreign exchange.

37. Foreign loans.

38. Reserve Bank of India.

39. Post Office Savings Bank.

40. Lotteries organised by the Government of India or the Government of a State.

41. Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.

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[1] Omitted by the Constitution (7th Amendment) Act, 1956.

21. Fisheries.

22. Courts of wards subject to the provisions of entry 34 of List I; encumbered and attached estates.

23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.

24. Industries subject to the provisions of *entries 7 and 52*[1] of List I.

25. Gas and gas-works.

26. Trade and commerce within the State subject to the provisions of entry 33 of List III.

27. Production, supply and distribution of goods subject to the provisions of entry 33 of List III.

28. Markets and fairs.

29. *Omitted.*

30. Money-lending and money-lendors; relief of agricultural indebtedness.

31. Inns and inn-keepers.

32. Incorporation, regulation and winding up of corporations, other than those specified in List I; and universities; unincorporated trading, literary, scientific, religious and other societies and associations, co-operative societies.

33. Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements.

34. Betting and gambling.

35. Works, lands and buildings vested in or the possession of the State.

---

[1] Substituted by the Constitution (7th Amendment) Act, 1956.

23. Social security and social insurance; employment and unemployment.

24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.

25. *Education, including technical education, medical education and universities, subject to entries 63-66 of List I;* vocational and technical training of labour.[1]

26. Legal, medical and other professions.

27. Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.

28. Charities and charitable institutions, charitable and religious endowments and religious institutions.

29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

30. Vital statistics including registration of births and deaths.

31. Ports other than those declared by or under law made by Parliament or existing law to be major ports.

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels and the rule of the road on such waterways, and the carriage of passengers and goods on and waterways subject to the provisions of List I with respect to national waterways.

33. Trade and commerce in, and the production, supply and distribution of,—

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[1] Inserted by the Constitution (42nd Amendment) Act, 1976.

TABLE XIX—*Contd.*

List I—Union List.

42. Inter-State trade and commerce.

43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies.

44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.

45. Banking.

46. Bills of exchange, cheques, promissory notes and other like instruments.

47. Insurance.

48. Stock exchanges and future markets.

49. Patents, inventions and designs; copyright; trade-marks and merchandise marks.

50. Establishment of standards of weight and measure.

51. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.

52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

53. Regulation and development of oilfields and mineral oil resources, petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.

54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

List II—State List.

36. *Omitted.*[1]

37. Elections to the Legislatures of the State subject to the provisions of any law made by Parliament.

38. Salaries and allowances of members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly, and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.

39. Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof and if there is a Legislative Council, of that council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State.

40. Salaries and allowances of Ministers for the State.

41. State public services; State Public Service Commission.

42. State pensions, that is to say, pensions payable by the State or out of the Consolidated Fund of the State.

43. Public debt of the State.

44. Treasure trove.

45. Land revenue, including the assessment and collection for revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.

46. Taxes on agricultural income.

47. Duties in respect of succession to agricultural land.

List III—Concurrent List.

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, *and imported goods of the same kind as such products;*

(b) *foodstuffs, including edible oilseeds and oils;*

(c) *cattle fodder, including oilcakes and other concentrates;*

(d) *raw cotton, whether ginned or unginned, and cotton seed; and*

(e) *raw jute.*[1]

33A. Weights and measures except establishment of standards.[2]

34. Price Control.

35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.

36. Factories.

37. Boilers.

38. Electricity.

39. Newspapers, books and printing presses.

40. Archaeological sites and remains other than those *declared by or under law made by Parliament*[3] to be of national importance.

41. Custody, management and disposal of property (including agricultural land) declared by law to be avacuee property.

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[1] Omitted by the Constitution (7th Amendment) Act, 1956.

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[1] Substituted by the Constitution (3rd Amendment) Act, 1954.

[2] Inserted by the Constitution (42nd Amendment) Act, 1976.

[3] Substituted by the Constitution (7th Amendment) Act, 1956.

55. *Regulation of labour and safety in mines and oilfields.*

56. Regulation and development of inter-State river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

57. Fishing and fisheries beyond territorial waters.

58. Manufacture, supply and distribution of salt by Union agencies; regulation and control of manufacture, supply and distribution of salt by other agencies.

59. Cultivation, manufacture, and sale for export, of opium.

60. Sanctioning of cinematograph films for exhibition.

61. Industrial disputes concerning Union employees.

62. The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other like institution financed by the Government of India wholly or in part and declared by Parliament by law to be an institution of national importance.

48. Estate duty in respect of Agricultural land.

49. Taxes on lands and buildings.

50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics;

but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

52. Taxes on the entry of goods into a local area for consumption, use or sale therein.

53. Taxes on the consumption or sale of electricity.

54. Taxes on the sale or purchase of goods other than newspapers, *subject to the provisions of entry 92A of List I.*[1]

55. Taxes on advertisements other than advertisements published in the newspapers [2][and advertisements broadcast by radio or television].

56. Taxes on goods and passengers carried by road or on inland waterways.

57. Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III.

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[1] Substituted by the Constitution (7th Amendment) Act, 1956.

[2] Inserted by the Constitution (Forthy-Second Amendment) Act, 1976.

42. *Acquisition and requisitioning of property.*[1]

43. Recovery in a State of claims in respect of taxes and other public demands, including arrears of land-revenue and sums recoverable as such arrears, arising outside that State.

44. Stamp duties other than duties on fees collected by means of judicial stamps, but not including rates of stamp duty.

45. Inquiries and statistics for the purposes of any of the matters specified in List II or List III.

46. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.

47. Fees in respect of any of the matters in this List, but not including fees taken in any court.

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[1] Substituted by the Constitution (7th Amendment) Act, 1956.

TABLE XIX—*Contd.*

List I—Union List.	*List II—State List.*	*List III—Concurrent List.*
63. The Institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University; *the University established in pursuance of Art. 371E*[1] and any other institution declared by Parliament by law to be an institution of national importance. 64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be an institutions of national importance. 65. Union agencies and institutions for— (a) professional, vocational or technical training, including the training of police officers; or (b) the promotion of special studies or research; or (c) scientific or technical assistance in the investigation or detection of crime. 66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions. 67. Ancient and historical monuments and records, and archaeological sites and remains, declared *by or under law made by Parliament*[2] to be of national importance. 68. The Survey of India, the Geological, Botanical, Zoological and Anthropological Surveys of India; Meteorological organisations.	58. Taxes on animals and boats. 59. Tolls. 60. Taxes on professions, trades, callings and employments. 61. Capitation taxes. 62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling. 63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty. 64. Offences against laws with respect to any of the matters in this List. 65. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List. 66. Fees in respect of any of the matters in this List, but not including fees taken in any court.	

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[1] Words in italics inserted by the Constitution (32nd Amendment) Act, 1973.

[2] Substituted by the Constitution (7th Amendment) Act, 1956.

69. Census.

70. Union public services; all-India services; Union Public Service Commission.

71. Union pensions, that is to say, pensions payable by the Government of India or out of the Consolidated Fund of India.

72. Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President; the Election Commission.

73. Salaries and allowances of members or Parliament, the Chairman and Deputy Chairman of the Council of States and the Speaker and Deputy Speaker of the House of the People.

74. Powers, privileges and immunities of each House of Parliament and of the members and the Committees of each House; enforcement of attendance of persons for giving evidence or producing documents before committees of Parliament or commissions appointed by Parliament.

75. Emoluments, allowances, privileges, and rights in respect of leave of absence, of the President and Governors; salaries and allowances of the Ministers for the Union; the salaries, allowances, and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General.

76. Audit of the accounts of the Union and of the States.

77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court.

TABLE XIX—*Contd.*

List I—Union List.

78. Constitution and organisation *including vacations*[1] of the High Court except provisions as to Officers and servants of High Courts; persons entitled to practise before the High Courts.

79. Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any *Union Territory.*[2]

80. Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside the State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State.

81. Inter-State migration; inter-State quarantine.

82. Taxes on income other than agricultural income.

83. Duties of customs including export duties.

84. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics.

but including medicinal and toilet preparations containing alcohol or any substances included in sub-paragraph (b) of this entry.

List II—State List.

List III—Concurrent List.

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[1] Inserted by the Constitution (15th Amendment) Act, 1963.

[2] Substituted by the Constitution (7th Amendment) Act, 1956.

85. *Corporation tax.*

86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.

87. Estate duty in respect of property other than agricultural land.

88. Duties in respect of succession to property other than agricultural land.

89. Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights.

90. Taxes other than stamp duties on transactions in stock exchanges and futures markets.

91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.

92. Taxes on the sale or purchase of newspapers and on advertisements published therein.

[1]*92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.*

[2]*92B.* Taxes on consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.

[3]92 C. Taxes on services.

93. Offences against laws with respect to any of the matters in this List.

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1. Inserted by the Constitution (6th Amendment) Act, 1956.
2. Inserted by the Constitution (Forty-sixth Amendmenr) Act, 1982, s. 5 (w.e.f. 2.2.1983).
3. Inserted by the Constitution (Eighty-eighth Amendment) Act, 2003.

TABLE XIX—*Contd.*

List I—Union List.	*List II—State List.*	*List III—Concurrent List.*
94. Inquiries, surveys and statistics for the purpose of any of the matters in this List. 95. Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction. 96. Fees in respect of any of the matters in this List, but not including fees taken by any Court. 97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.		

TABLE XX

LANGUAGES

[Arts. 344(1), 351, 8th Sch.]

1. Assamese.
2. Bengali.
3. Bodo[1]
4. Dogri[1]
5. Gujarati.
6. Hindi.
7. Kannada.
8. Kashmiri.
9. *Konkani.*[2]
10. Mathilli[1]
11. Malayalam.
12. *Manipuri.*[2]
13. Marathi
14. *Nepali.*[2]
15. Oriya.
16. Punjabi.
17. Sanskrit.
18. Santhali
19. *Sindhi.*[3]
20. Tamil.
21. Telugu.
22. Urdu.

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[1] *Inserted* by the Constitution (Ninety-second Amendment) Act, 2003.

[2] *Inserted* by the Constitution (71st Amendment) Act, 1992.

[3] *Added* by the Constitution (21st Amendment) Act, 1967.

TABLE XXI

PRESIDENT'S RULE IN STATES AND UNION TERRITORIES

Sl. No.	State/U.T.	No. of times President's rule imposed	Duration of President's rule	
			From	To
1	2	3	4	5
1.	Andhra Pradesh	2	15-11-1954	28-3-1955
			18-1-1973	10-12-1973
2.	Assam	4	12-12-1979	6-12-1980
			30-6-1981	13-1-1982
			19-3-1982	27-2-1983
			27-11-1990	30-6-1991
3.	Bihar	6	29-6-1968	26-2-1969
			4-7-1969	16-2-1970
			9-1-1972	19-3-1972
			30-4-1977	24-6-1977
			17-2-1980	8-6-1980
			28-3-1995	4-4-1995
			12-2-1999	8-3-1999
4.	Goa	1	10-2-1999	9-6-1999
5.	Gujarat	5	13-5-1971	17-3-1972
			9-2-1974	18-6-1975
			12-3-1976	24-12-1976
			17-2-1980	7-6-1980
			19-9-1996[1]	23-10-1996
6.	Haryana	3	21-11-1967	21-5-1968
			30-4-1977	21-6-1977
			6-4-1991	23-6-1991
7.	Himachal Pradesh	2	30-4-1977	22-6-1977
			15-12-1992[2]	3-12-1993
8.	Jammu and Kashmir	2	7-9-1986	6-11-1986
			19-7-1990	9-10-1996
9.	Karnataka	4	27-3-1971	20-3-1972
			31-12-1977	27-2-1978
			21-4-1989	20-11-1989
			10-10-1990	17-10-1990
10.	Kerala	9	23-3-1956	1-11-1956
			1-11-1956	5-4-1957
			31-7-1959	22-2-1960
			10-9-1964	24-3-1965
			24-3-1965	6-3-1967
			4-8-1970	3-10-1970
			5-12-1979	25-1-1980
			21-10-1981	28-12-1981
			17-3-1982	24-5-1982
11.	Madhya Pradesh	3	30-4-1977	23-6-1977
			17-2-1980	9-6-1980
			15-12-1992[2]	7-12-1993
12.	Maharashtra	1	17-2-1980	9-6-1980

TABLE XXI — *Contd.*

Sl. No.	State/U.T.	No. of times 's President's rule imposed	Duration of President's rule	
			From	To
1	2	3	4	5
13.	Manipur	7	21-1-1972	20-3-1972
			28-3-1973	4-3-1974
			16-5-1977	29-6-1977
			14-11-1979	13-1-1980
			28-2-1981	19-6-1981
			7-1-1992	8-4-1992
			1-1-1994	13-12-1994
14.	Mizoram	1	7-9-1988	24-1-1989
15.	Nagaland	3	22-3-1975	25-11-1977
			7-8-1988	25-1-1989
			2-4-1992	22-2-1993
16.	Orissa	6	25-2-1961	23-6-1961
			11-1-1971	3-4-1971
			3-3-1973	6-3-1974
			16-12-1976	29-12-1976
			30-4-1977	6-6-1977
			17-2-1980	9-6-1980
17.	Patiala and East Punjab States Union (PEPSU)	1	4-3-1953	7-3-1954
18.	Punjab	8	20-6-1951	17-4-1952
			5-7-1966	1-11-1966
			23-8-1968	17-2-1969
			15-6-1971	17-3-1972
			30-4-1977	20-6-1977
			17-2-1980	7-6-1980
			6-10-1983	29-9-1985
			11-5-1987	25-2-1992
19.	Rajasthan	4	13-3-1967	26-4-1967
			30-4-1977	22-6-1977
			17-2-1980	6-6-1980
			15-12-1992[2]	4-12-1993
20.	Sikkim	2	18-8-1979	17-10-1979
			25-5-1984	8-3-1985
21.	Tamil Nadu	4	31-1-1976	30-6-1977
			17-2-1980	9-6-1980
			30-1-1988	27-1-1989
			30-1-1991	24-6-1992
22.	Tripura	3	21-1-1972	20-3-1972
			5-11-1977	4-1-1978
			12-3-1993[3]	9-4-1993
23.	Uttar Pradesh	9	25-2-1968	26-2-1969
			1-10-1970	18-10-1970
			13-6-1973	8-11-1973
			30-11-1975	21-1-1976
			30-4-1977	23-6-1977
			17-2-1980	9-6-1980
			6-12-1992[4]	4-12-1993
			18-10-1995[5]	17-10-1996
			18-10-1996[6]	21-3-1997

TABLE XXI — *Contd.*

Sl. No.	State/U.T.	No. of times President's rule imposed	Duration of President's rule	
			From	To
1	2	3	4	5
24.	West Bengal	4	20-2-1968 19-3-1970 29-6-1971 30-4-1977	25-2-1969 2-4-1971 20-3-1972 21-6-1977
25.	Arunachal Pradesh	1	3-11-1979	18-1-1980
26.	Goa	3	3-12-1966 28-4-1979 14-12-1990	5-4-1967 16-1-1980 25-1-1991
27.	Meghalaya	1	10-10-1991	5-2-1992
28.	Mizoram	2	11-5-1977 11-11-1978	2-6-1978 8-5-1979
29.	Pondicherry	6	18-9-1968 3-1-1974 28-3-1974 12-11-1978 24-6-1983 12-1-1991	17-3-1969 6-3-1974 2-7-1977 16-1-1980 16-3-1985 4-7-1991
		108		

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1. Writ Petition challenging the Proclamation is pending before the Gujarat High Court.
2. Writ Petition challenging Proclamation brought before the Supreme Court has been dismissed and the validity of these Proclamations have been upheld by a 9-Judge Bench [*Bommai* v. *Union of India,* A. 1994 S.C. 1918 (paras. 91(x), 366)].
3. As a stop-gap arrangement to enable a fresh election of the State Assembly, which had not taken place before the expiry of its term.
4. On ground of failure of B.J.P. Government to prevent demolition of the disputed Babri Masjid structure.
5. On the B.S.P. Government of Mayavati losing majority on the withdrawal of the support of the B.J.P.
6. On the failure of any Party to be able to form a Government. A writ petition challenging the proclamation was allowed by the Allahabad High Court. An appeal is pending in the Supreme Court (January 1997).

INDEX

A

- **Accused:**
  - immunity from double prosecution and punishment, 110
  - immunity of, against self-incriminating evidence, 110
  - prohibition against *ex post facto* legislation, 109
- **Acquired Territory, 67, 71**
- **Acquisition, of Property [see Property]**
  - adequacy of compensation for, not justiciable, 127
  - compensation in case of, 127-28
  - how far affected by Constitution (4th Amendment) Act, 1955, 127
  - how far affected by 25th Amendment, 127
  - how far affected by 42nd Amendment Act, 128
  - meaning of, 127
  - of estates and rights therein [Art. 31A], 128
- **Administration:**
  - of Union Territories, 275-77
- **Adult Franchise, 25, 395**
- **Advocate-General for a State, 245**
- **All-India Services, 391**
- **Amendment to Constitution:**
  - bills for amendment, subject to ordinary procedure for legislation, as modified by Art. 368, 164
  - changes made by 42nd Amendment Act, 167
  - changes made by 43rd and 44th Amendments Act, 170
  - changes not to be deemed as, 162
  - constituent power vested in Parliament, 163
  - Constitutional limitations, upon power of, 163-64
  - dangers of frequent amendments, 170
  - general features of, 163
  - history of since 1950, Table IV, 451
  - nature of amending process, 162
  - no provision of Constitution immune from, 166
  - President bound to give assent, 164
  - procedure for amendment, 162-63
  - 24th Amendment, 164
  - whether basic features are amendable, 166
  - with respect to Fundamental Rights, 165
- **Anglo-Indians:**
  - special provision for [Art. 336], 405
- **Annual financial statement, 227**
- **Appropriation Act, 228**
- **Appropriation requires a law, 230**
- **Arrest:**
  - right to be defended by a legal practitioner, 114
  - right to be informed of the grounds of, 114
  - safeguards against, 114
  - safeguards not available to — *aliens,* 114
  - *detenus,* 114
- **Attorney-General for India, 203**

B

- **Backward Classes:**
  - discrimination in favour of, 93-94
  - reservation for in services, 98
  - safeguards for, 96
  - separate provisions for, in general, 404
- **Basic features of Constitution, 49, 166, 425**
- **Bill:**
  - Bill of Rights, 42
  - Bill of Rights in the U.S.A., distinguished from fundamental rights under the Indian constitution, 81, 82
  - Kerala Education Bill, 312
  - Money Bills—
    - distinction between financial bills and, 223
    - procedure for passing of, 222-24
    - Speaker's certificate for, 217, 223
    - What are, 222
  - Other than Money Bill—
    - mode of removing deadlock between two Houses, 224
    - stages in the passing of, 220
    - when becomes law, 224
- **Boundaries, alteration of, 70**
- **British Commonwealth, 22**
- **British North America Act, 51**
- **Budget, 226**
  - policy statement in, 226

C

- **Cabinet Mission:**
  - proposal of, 46
- **Certiorari:**
  - distinguished from Prohibition, 137
  - nature of, 137-38
  - on ground of want or excess of jurisdiction, 137-138
- **Chairman of the Council of States, 218**
- **Chief Commissioner, 275**
  - his provinces in Part C States, 275

Citizens of India:
  who are—
  at the commencement of Constitution, 74
  by birth, 76
  by descent, 76
  by incorporation of territory, 76
  by naturalisation, 76
  by registration, 76
  rights and privileges of, 74
Citizenship:
  meaning of, 74
Citizenship Act, 1955, 76
Citizenship of India:
  after commencement of Constitution—law relating to, 74
  at the commencement of Constitution—mode of acquisition of, 75
  constitutional and statutory basis of, 74
  deprivation of, 76
  domicile in India, 75
  effect of migration from Pakistan, 75
  effect of migration to Pakistan, 75
  modes of acquisition of, 75-76
  single, 76
  termination of, 76
  who became on 26-1-1950, 75
Committee of Public Accounts, 229
Committee on Estimates, 229
Communal Representation,
  abolition of, 43
Comptroller and Auditor-General:
  compared with this British counterpart, 205
  conditions of service of, 204
  duties and powers of, 204
Consolidated Fund,
  expenditure charged on, 227
Constituent Assembly :
  adoption of the Objectives Resolution by, 20
  Cabinet Delegation, 15
  Committees of, 19
  Cripps Mission, 14
  demand for a constitution framed by, 14
  election of, 18
  of India, 18
  also Table II, 448
  passing of the Constitution by, 18
Constitutional remedies:
  for enforcement of fundamental rights, 131
Constitution of India :
  abolishes communal representation, 43
  adopts unqualified adult franchise, 43
  both justiciable and non-justiciable rights included : Fundamental rights, Directive principles and Fundamental duties, 35
Constitution of India—*Contd.*
  combines Parliamentary Government with a President, 44
  constitution of the units included, 34
  date of commencement of, 19
  detailed administrative provisions included, 33
  drawn from different sources, 32
  effect of 42nd Amendment Act, 44
  federal relations elaborately dealt with, 35
  fundamental rights, subject to reasonable regulation by Legislature, 42
  guarantees social equality, 42
  harmonises Fundamental rights with security of State, 42
  historical retrospect of, 3
  incorporates the accumulated experience of different Constitutions, 33
  longest known Constitution, 33
  more flexible than rigid, 35
  outstanding features of, 32-49
  peculiarities of the problems to be solved, 34
  reconciles Parliamentary sovereignty with written Constitution, 37
  role of conventions under, 38
  sources of, 32
  special provision for Jammu and Kashmir, 34
  supplemented by legislation, 36
  supplemented by multiple amendments, and practically recast by the 42nd, 43rd and 44th Amendments, 1976-78, 32
  tends towards unitary system, 45
  universal franchise, 43
Constitution Amendment Acts:
  First Amendment Act, 1951, 84, 451
  Second Amendment Act, 1952, 451
  Third Amendment Act, 1954, 451
  Fourth Amendment Act, 1955, 84, 127, 451
  Fifth Amendment Act, 1955, 451
  Sixth Amendment Act, 1956, 451
  Seventh Amendment Act, 1956, 37, 49, 55, 73, 212, 242, 246, 261, 263, 275, 276, 452
  Eighth Amendment Act, 1959, 261, 452
  Ninth Amendment Act, 1960, 72, 452
  Tenth Amendment Act, 1962, 73, 276, 453
  Eleventh Amendment Act, 1961, 453
  Twelfth Amendment Act, 1962, 73, 276, 453
  Thirteenth Amendment Act, 1962, 453
  Fourteenth Amendment Act, 1962, 73, 276, 453
  Fifteenth Amendment Act, 1963, 149, 326, 453
  Sixteenth Amendment Act, 1963, 56, 145, 454

Constitution Amendment Acts —*Contd.*
Seventeenth Amendment Act, 1964, 454
Eighteenth Amendment Act, 1966, 454
Nineteenth Amendment Act, 1966, 455
Twentienth Amendment Act, 1966, 455
Twenty-first Amendment Act, 1967, 455
Twenty-second Amendment Act, 1969, 73, 260, 455
Twenty-third Amendment Act, 1969, 240, 261, 455
Twenty-fourth Amendment Act, 1971, 37, 49, 85, 164, 165, 455
Twenty-fifth Amendment Act, 1971, 37, 127, 149, 166, 455
Twenty-sixth Amendment Act, 1971, 50, 456
Twenty-seventh Amendment Act, 1971, 456
Twenty-eighth Amendment Act, 1972, 456
Twenty-ninth Amendment Act, 1972, 456
Thirtieth Amendment Act, 1972, 456
Thirty-first Amendment Act, 1973, 456
Thirty-second Amendment Act, 1973, 78, 457
Thirty-third Amendment Act, 1974, 457
Thirty-fourth Amendment Act, 1974, 457
Thirty-fifth Amendment Act, 1974, 37, 58, 68, 163, 457
Thirty-sixth Amendment Act, 1975, 37, 58, 68, 163, 260, 457
Thirty-seventh Amendment Act, 1975, 276, 457
Thirty-eighth Amendment Act, 1975, 457
Thirty-ninth Amendment Act, 1975, 458
Fortieth Amendment Act, 1976, 458
Forty-first Amendment Act, 1976, 378, 458
Forty-second Amendment Act, 1976, 26, 27, 28, 29, 35, 38, 41, 43, 49, 82, 128, 142, 143, 311, 382, 458
Forty-third Amendment Act, 1977, 41, 143, 311, 459
Forty-fourth Amendment Act, 1978, 27, 29, 31, 41, 45, 66, 81, 128-29, 141, 311, 357, 358, 359, 361, 362, 366, 367, 459
Forty-fifth Amendment Act, 1980, 460
Forty-sixth Amendment Act, 1982, 460
Forty-seventh Amendment Act, 1984, 460
Forty-eighth Amendment Act, 1984, 460
Forty-ninth Amendment Act, 1984, 460
Fiftieth Amendment Act, 1984, 460
Fifty-first Amendment Act, 1984, 460
Fifty-second Amendment Act, 1985, 460
Fifty-third Amendment Act, 1986, 460
Fifty-fourth Amendment Act, 1986, 461
Fifty-fifth Amendment Act, 1986, 461
Fifty-sixth Amendment Act, 1987, 461
Fifty-seventh Amendment Act, 1987, 461
Fifty-eighth Amendment Act, 1987, 461
Fifty-ninth Amendment Act, 1988, 461
Sixtieth Amendment Act, 1988, 462
Sixty-first Amendment Act, 1989, 462

Constitution Amendment Acts —*Contd.*
Sixty-second Amendment Act, 1989, 462
Sixty-third Amendment Act, 1989, 462
Sixty-fourth Amendment Act, 1990, 462
Sixty-fifth Amendment Act, 1990, 462
Sixty-sixth Amendment Act, 1990, 463
Sixty-seventh Amendment Act, 1990, 463
Sixty-eighth Amendment Act, 1991, 463
Sixty-ninth Amendment Act, 1991, 463
Seventieth Amendment Act, 1992, 463
Seventy-first Amendment Act, 1992, 463
Seventy-second Amendment Act, 1992, 463
Seventy-third Amendment Act, 1993, 463
Seventy-fourth Amendment Act, 1993, 463
Seventy-fifth Amendment Act, 1993, 463
Seventy-sixth Amendment Act, 1994, 464
Seventy-seventh Amendment Act, 1995, 96, 464
Seventy-eighth Amendment Act, 1995, 464
Seventy-ninth Amendment Act, 1999, 50, 464
Eightieth Amendment Act, 2000, 464
Eighty-first Amendment Act, 2000, 464
Eighty-second Amendment Act, 2000, 464
Eighty-third Amendment Act, 2000, 464
Eighty-fourth Amendment Act, 2001, 464
Eighty-fifth Amendment Act, 2001, 464
Eighty-sixth Amendment Act, 2002, 465
Eighty-seventh Amendment Act, 2003, 465
Eighty-eighth Amendment Act, 2003, 465
Eighty-ninth Amendment Act, 2003, 465
Ninetieth Amendment Act, 2003, 465
Ninety-first Amendment Act, 2003, 465
Ninety-second Amendment Act, 2003, 465
Ninety-third Amendment Act, 2005, 465
Ninety-fourth Amendment Act, 2006, 465
Table showing Amendment Acts,— Table IV, 451 *et seq.*

Constitution of 1949, 126-27

Constitution Order of 1950, 265

Constitution (Application of Jammu and Kashmir) Order, 1954, 78, 265

Contingency Fund, 230

Contracts:
effect, of non-compliance with Art. 307, 373
how made—
on behalf of Union [Art. 299], 373
on behalf of States, 372

Conviction for offences, prohibition against, 109

Co-ordination:
between States, 353
between the units of the federation, 344

Council of Ministers:
of the States—
appointment of, 241

Council of Ministers—*Contd.*
relationship between Governor and, 241
of the Union—
a body recognised by the Constitution, 196
collective responsibility of [Art. 75(3)], 197
position of individual Ministers, 198
President's power of dismissal of individual ministers, 198
relation between President and, 200-202
special position of Prime Minister in, 198
to aid and advise President [Art. 74(1)], 201
when not bound to resign, 199
of the Union and Cabinet—
appointment of, 196

Council of States:
Chairman of, 218
composition of, 211
constitutional position of, as compared with that of the House of the People, 231
duration of, 214
proportional representation for, 213

Cripps Mission [see under "Constituent Assembly"], 14

D

Deadlock, between Houses of Parliament, 224

Declaration of Human Rights, (1948): Art. 1, 27

Defence Forces, supreme command of, 182

Demand for grants, 227

Democracy:
democratic society, 24
representative democracy, 23

Deputy Speaker, 218

Dignity of the Individual, 28

Directions:
power of Union to issue, to State Governments, 345
sanction for enforcement of, 345

Directive Principles of State Policy:
classification of, 151
conflict with fundamental rights, 153
contained in other parts of the Constitution, 159-60
fundamental in the governance of the country, 35
fundamental rights and, 153
implementation of the, 157
nature of the economic democracy envisaged by, 151
sanction behind, 154
scope of, 151
utility of, 155
whether Arts. 355, 356, can be applied to enforce implementation of, 154

Discrimination:
as to public employment [see "Employment under the State"] discrimination permissible if there are grounds other than religion, race, caste, sex or place of birth, 93
in favour of backward classes, 96
in favour of women and children, 93

Distribution of legislative powers:
extent of State legislation, 328
extent of Union legislation, 328
in emergencies, 333
in financial emergency, 333
in normal time, 332
limitation to territorial jurisdiction of Parliament, 328
power of Parliament to legislate for State subject—
by consent of two or more States, 330
in the national interest, 330
in Emergency, 330
on failure of constitutional machinery, 331
to give effect to international agreements, 331
repugnancy, in the concurrent field, 329
residuary power, 329
scheme of, 327
to levy taxes, 336

Distribution of Executive powers, 331

Distribution of financial resources:
distribution of proceeds of taxes, 337
exemption of Union and State properties from mutual taxation, 337
grants-in-aid, 339
levy of taxes, 336
need for, 335
non-tax revenues, 339
profession tax, 336
sales tax, 336
tax on consumption or sale of electricity, 337
tax revenues, 336-39

Due process, 41, 112

E

Economic Justice, 25

Educations:
admission not to be denied on ground of race, religion etc., 400
in mother-tongue, 400
right of minorities to establish educational institutions, 401

Elections, 395
changes made by the 42nd Amendment Act, 396
decision of disputes relating to, 396
jurisdiction of Courts regarding, 396
of President or Vice-President, doubts and disputes relating to, 179

Election Commission, 396

Electoral college for election of President, 175

Emergency:
- different kinds of, 357
- frequent and improper use of, 364
- instances, under Art. 356, Table XXI, 492-494
- powers of Union during, 333

Employment under the State:
- equality of opportunity for—
  - discrimination on ground of residence when possible, 96
  - exception in case of office relating to denominational institutions, 96
  - exceptions to the rule, 96
  - guaranteed by Art. 16, 95
  - reservation for backward classes, 96

Employment of children in factories, prohibition of, 118

Equal Protection:
- intelligible differentia and its rational relation, to the object of the Act, 89
- of the laws, 89-90
- presumption of reasonableness of classification, 89-90
- what classification is reasonable, 89
- what it means, 89-90

Equality before the law, 88
- and equal protection of the laws, 89
- exceptions to, 88

Equality of opportunity:
- exceptions to the equality, 96
- in public employment, 95

Estimates, Committee, 229

Executive Power :
- expenditure, votable and non-votable, 226
- of a State, 333
- of the Union, 331

Executive Power of the 'Union':
- during a proclamation of emergency, 333
- in emergencies, 333
- in normal times, 332

Expenditure charged on the Consolidated Fund, 227

Exploitation:
- employment of children, 118
- *Ex post facto* legislation: prohibition against, 109
- forced labour, 118
- right against, 118
- traffic in human beings, 118

F

Federal Constitution:
- different types of, in the modern world, 51

Federal system:
- a critique of, 60

Federal system:—*Contd.*
- as envisaged by the Government of India Act, 1935, 54
- co-ordination between units and Union, 344
- effect of 35th and 36th Amendments, 57-58
- essentials of, 52
- freedom of inter-State trade and commerce, 354-56
- full faith and credit, 352
- Indian Constitution basically Federal with unitary features, 52
- in emergency, 59
- inter-State comity, 352
- inter-State Councils, 346, 353
- mutual delegations of functions, 350
- mutual immunity from taxation, 350
- nature of, 51-66
- no double citizenship, 58
- no separation of judiciary, 59
- no separation of public officials, 58
- one citizenship, 76
- power of Union to issue directions, 60
- prevention and settlement of disputes, 352
- States are not equal, 57
- States' consent not required for alteration of boundaries, 56
- States have no residuary powers, 55
- States were not sovereign before federation, 55
- status of Sikkim, 57
- Union control over States, 59
- with a unitary bias, 45
- zonal Councils, 353

Federal structure compared, 51-52

Federation in India:
- survival of, 63

Finance Commission:
- constitutions and functions of, 339
- the first Finance Commission, 340
- the second Finance Commission, 340
- the third Finance Commission, 340
- the fourth Finance Commission, 340
- the fifth Finance Commission, 340
- the sixth Finance Commission, 340
- the seventh Finance Commission, 341
- the eighth Finance Commission, 341
- the ninth Finance Commission, 341
- the tenth Finance Commission, 341
- the twelfth Finance Commission, 341
- the thirteenth Finance Commission, 341
- the eleventh Finance Commission, 341
- the twelfth Finance Commission, 341
- the thirteenth Finance Commission, 341

Financial control of States by Union, 341

Financial Emergency, 366

Financial Procedure (legislation):
- in Parliament, 226
- parts played by the two Houses, 227

Financial Resources, distribution of between Union and States, 335
Financial Statement, Annual, 227
Financial system:
Parliament's control over, 228
Freedom of assembly, 103
Freedom of association, 103
  restrictions upon, 102-03
Freedom of conscience, 119
Free profession, practice and propagation of religion, 119
Freedom of movement, 103
Freedom of person, 111
  protection against arbitrary arrest and detention, 114
  protection of life and personal liberty, 111
Freedom of Press, 106
Freedoms:
  limitations upon the, 102
  scope for judicial review, 104
  tests of reasonableness of a restriction, 105
Freedom of profession, 104
Freedom of property, 81, 126-31
Freedom of religion:
  no State religion, 119
  'propagation' and conversion, 121
  religious denomination, rights of, 120
  to profess and practice, 119
  what is religion, 120
Freedom of residence, 101-02
Freedom of speech and expression, 101
Freedom of trade, 101-02
  restrictions upon, 103
Full faith and credit, 352
Fundamental duties, 79, 82, 143
  fundamental right checkmated by, 42
  inserted by 42nd Amendment Act, 29
Fundamental Rights guaranteed by Art. 19:
  a guarantee against State action, 87
  amendability of, 84
  and directive principles, 35
  and individual rights, 79
  bill of rights in the USA, 79
  checkmated by fundamental duties, 42
  classification of, 85
  comparison with other rights, 84
  constitutional remedies for enforcement of, 131
  difference from other constitutional rights, 84
  distinguished from American Bill of Rights, 81
  enumeration in Part III, 83
  exception to, 82, 142
  exhaustiveness of enumeration of, 83
  history of the demand for, 80

Fundamental Rights guaranteed by Art. 19—*Contd.*
  individual Rights and, 79
  laws contravening and power of courts, 80
  limitations upon, 102
  Power of Parliament to modify, in their application to—
  Martial Law area, 140
  prohibition of discrimination on grounds of religion, race, caste, sex, place of birth, 93
  reasonable restrictions on [see 'reasonable restriction']
  Six freedoms, 101
  scope for judicial review [see 'judicial review']
  subject to reasonable regulation by legislature, 42
  suspension of, during Proclamation of Emergency, 141
  the position in England, 79
  what is reasonable restriction, 105

G

Government:
  ability of, to be sued, 373
  right of, to sue, 373
  suability of, 373
    in contract, 374
    in torts, 374
Government of India Acts—
  1858, 3
  1915, 5
  1919, 5-7, 275
  1935, 8, 33, 46, 55, 75, 188, 190, 203, 205, 275, 329, 335, 345
Government contracts:
  formalities for, 372
Government servant:
  effect of 42nd Amendment, 382-83
  compensation payable for premature termination of contractual service, 381
  conditions of service, of, how regulated, 380
  in which cases opportunity is to be given, 383
  office held by during pleasure of Government, 382
  'opportunity' at two stages superseded by 42nd Amendment, 382
  no dismissal by authority subordinate to appointing authority, 382
  no dismissal without giving opportunity, 382
Governor:
  appointment of, 237
  appointment of Ministers by, 241
  as constitutional head, 237
  duration of office of, 240

Governor—*Contd.*
- control over, by President, 243
- discretion of, 242
- emergency powers of, 241
- executive powers of, 240
- judicial powers of, 241
- legislative powers of, 240
- of Assam, 242
- Ordinance-making power of, compared with President, 258
- powers of, 240
- special responsibilities of, 242
- status of appointed, 239
- term of office of, 237
- to make Ordinances, 240, 258
- veto power of, 240, 255
- veto power of, compared with President, 256
- whether competent to dismiss of Chief Minister, 243
- why an appointed Governor, 238

Governor-General:
- as constitutional head, 12
- overriding powers of, 7

Grants-in-aid, 339, 346

H

Habeas Corpus:
- cases where issued, 135
- detention by private person, 135
- nature of, 135
- when does not lie, 135

High Court:
- Constitution of, 314
- control of Union over, 316
- control over subordinate Courts, 322
- impact of the 42nd, 43rd and 44th Amendments upon the High Court, 322
- Judges of—
  - appointment of, 314
    - participatory consultative process in, 314
  - independence of, 316
  - salaries of, 316
  - qualifications for appointment as, 316
  - transfer of, 317
- jurisdiction of—
  - appellate, 319
  - ordinary, 318
  - original, 319
  - over administrative tribunals, 320
  - power of superintendence of, 319
  - to issue writs, 321
- power of superintendence of, 321
- territorial jurisdiction of, 318

House of Parliament:
- duration of, 214
- extension of duration during Proclamation of Emergency, 214

House of the People:
- composition of, 211
- constitutional position compared with that of the Council of States, 231
- territorial constituencies for election to, 212

I

Immunity from double punishment, 110

Immunity from self-incrimination, 110

Immunity from mutual taxation, of the Union and the States, 350

Immunity of—
- President or Governor for official acts, 376

Impeachment of President, 176

Independence of the Judges of the Supreme Court, 303

India:
- a Union of States, 51
- territory of, 67
- Union of, 67

Indian Councils Acts:
- 1861, 4
- 1892, 4
- 1909, 5

Indian federalism:
- peculiar features of, 53

Indian Independence Act, 1947:
- changes introduced by, 11
- effects on the Government of India Act, 1935, 12
- lapse of paramountcy under, 47
- outstanding features of, 18

Indian Legislature:
- made more representative, 7

Indian States:
- abolition of Part B States, as a category, 49
- accession to Dominion of India, 47
- integration of, 45, 47
- place of, in the federal scheme under Government of India Act, 1935, 46
- place under the original Constitution, 47-49
- reorganisation of, 49
- status of, under British Crown, 45

International Peace, promotion of, 22

Inter-State Commerce Commission, 345

Inter-State comity, 352

Inter-State Councils, 345, 353

Integrity of the Nation, 21, 27

Inter-State trade and commerce, freedom of, 355

J

Jammu and Kashmir:
- accession of, 48
  - implications of, 264
- amendment of State Constitution of, 270

Jammu and Kashmir—*Contd.*
articles of Constitution of India, applicable to, 264-65
autonomy of, 269
constitutional position of, *vis-a-vis* the Union, 269
effect of Constitution (7th Amendment) Act, on, 263
fundamental rights in, 270
history of integration of, with India, 263
High Court of, 268
Indira-Abdullah agreement of 1975, 268
important provisions of, 267
peculiar position, 263
position under the original constitution, 263
special provisions for, 34
State Constitution of—
making of, 265
Joint sitting of both Houses, 225
Judges of Supreme Court—
qualification, appointment and tenure of, 301-02
Judicial Review, 39, 104
and parliamentary supremacy, 40
makes the constitution legalistic, 39
scope for, 104
Judicial supremacy, 40
Judicial writs, 135-40
Judiciary:
hierarchy of courts, 299
High Court, 314
no federal distribution of judicial powers, 299
organisation of, 299
single, integrated, 299
Subordinate Courts, 322
Supreme Court, 301

L

Lahore resolution of the Muslim League, 19
Language, official:
need for, 407
of a State, 410
Official Languages Act, 1963, 411
of the Union, 407
special directive relating to, 412
standing commission, 409
to be used in Supreme Court, High Courts, for Acts, Bills, etc., 410
Legislative Assembly, 248
composition of, 248
duration of, 249
Legislative Council, 248-50
compared with Council of States, 250
composition of, 248
duration of, 249
provision for abolition of, 247
Legislative powers:
distribution of, 327
expansion of, the Union in different circumstances, 330
scheme of distribution of, 327
Legislative Lists, interpretation of, 331
Legislative procedure—
in a State having bicameral legislature, 250
in Parliament, 220
in State Legislature, 250
procedure for removing deadlock between two Houses, 224
Liberty, 25
Liberty, equality and fraternity, 25
Limited Government, 39

M

Mandamus, 135-37
Members of Parliament:
decision of questions to qualifications of, 216
disqualification of, 215
penalty for sitting when not qualified, 216
privileges of, 218-220
qualifications of, 215
salaries and allowances of, 216
when to vocate seat, 216
Ministers:
advice of, 196
appointment of, 196
Council of, 196
individual responsibility to President, 198
legal responsibility of, 198
position of in relation to President, 200
relationship with Prime Minister, 198-99
responsibility to Parliament, 197
salaries of, 197
Ministerial Advice:
how far the President is bound to act upon, 201-202
Ministerial Responsibility:
collective, 197
individual, 198
in Union and States, 197
legal, 198
Money Bills:
distinguished from Financial Bills, 223-224
how passed, 222-223
what are, 223
Montague-Chelsmford Report, 5
Morely-Minto Reforms, 5
'Mountbatten Plan', 16-17
Muslim League, 15

N

National Development Council, 348
National interest, 330

- **National sentiment, lack of, 434**
- **New States:**
  - added since 1950, 259-60
  - formation of, alteration of boundaries, 70
- **Non-cooperation, 7**

O

- **Objective Resolution, 20**
- **Officers of Parliament, 218**
- **Officials:**
  - position of, in Parliamentary Government, 379
- **Official language, 407**
- **Official Language Commission, 408**
- **Opening Address, 184**
- **Ordinance-making powers:**
  - of Governor, 257
  - of President, 190
  - possibility of abuse of, 191

P

- **Panchayats :**
  - bar to interference by courts in electoral matters of, 285
  - chairpersons of, 283
  - composition, 283
  - duration of, 284
  - finance commissions for, 284
  - financial resources of, 284
  - imposition of taxes, powers of, 284
  - powers authorities and responsibilities of, 284
  - qualification for membership of, 284
  - reservation, 283
  - state election commission, 285
  - three-tier system, 283
- **Paramountcy, 46**
  - lapse of, 47
- **Pardoning powers of President and Governor, 192**
- **Parliament:**
  - both Houses, of, 212
  - constitution of, 212
  - control of, over financial system, 228
  - duration of, 214
  - functions of, 210
  - legislative procedure, 220
  - limitations to the territorial jurisdiction of, 328
  - powers, privileges and immunities of, 218
  - power to legislate during failure of constitutional machinery in a State, 331, 362
  - power to legislate during Proclamation of Emergency, 330, 359
  - power to legislate for giving effect to international agreements, 331
  - power to legislate for State in national interest, 330
- **Parliament**—*Contd.*
  - power to legislate for States with their consent, 328
  - power to modify or restrict fundamental rights, 140
  - privileges of, 218-19
  - procedure at joint sitting, 225
  - procedure in, compared with that in State Legislature, 251
  - residuary power of, 329
  - sessions of, 214
  - summoning, adjournment, prorogation and dissolution of, 214-15
- **Parliamentary government, with elected President in India, 44**
- **Parliamentary democracy, 23**
- **Parliamentary safeguard, 192**
- **Parliamentary Supremacy:**
  - compromise between judicial Review and, 40
- **Partition of:**
  - Bengal, 17
  - Punjab, 17
- **Personal liberty:**
  - how safeguarded, 111
- **Patel Scheme, 47**
- **Petition of Right, 1628, 39**
- **Philosophy of the Constitution:**
  - Democracy—
    - representative, 23
  - Democratic society,
    - political democracy, 24
  - dignity of the individual, 28
  - Economic justice, 24
  - equality, 25
  - equality of status and opportunity, 25
  - fraternity, 27
  - from socialistic pattern of society to socialism, 26
  - government of the people, by the people and for the people, 23
  - independent and Sovereign India, 21
  - international peace, promotion of, 22
  - liberty, 25
  - Objectives Resolution, 20
  - Republic, 21
  - 'secular' inserted in the Preamble by 42nd Amendment, 27
  - Secular State, guaranteeing freedom of religion to all, 27
  - sovereignty not inconsistent with the membership of the Commonwealth, 22
  - The Preamble, 20
  - unity of integrity of the nation, 27
- **Planning Commission, 347**
- **Political justice, 24**
- **Preamble, 20**

President—
- address and message to Parliament, 184
- address to Parliament, 184
- administrative power, 181
- assent to legislation, 186
- changes made by 42nd, 43rd and 44th Amendments, 201
- compared with American President, 200
- compared with English Crown, 200
- compared with Governor, 256-57
- conditions of office of, 176
- constitutional limitations on, 180
- determination of disputes, re-election of, 179
- diplomatic and military, 182
  - emergency, 195
  - executive, 180
  - legislative, 184
  - ordinance-making, 190
  - to control Governor, 194
- disallowance of State legislation, 189
- election of, 175
- emoluments and allowances of, 177
- how far bound to act on ministerial advice, 202
- impeachment of, procedure for, 176
- laying reports before Parliament, 185
- ministers in relation to, 200-02
- miscellaneous powers, 194
- nature of, 180
- nominating members to Houses of Parliament, 185
- opening address, 184
- Ordinance-making power of, 190
- pardoning power of, and of Governor, compared, 193
- powers of, 180
- previous sanction to legislation, 185
- qualifications for office of, 175
- removal of, 176
- status of—
  - after 1977, 201
  - effect of the 42nd Amendment Act, 201
  - effect of 43rd and 44th Amendments, 202
  - prior to 1977, 201
- summoning, prorogation and dissolution of Parliament, 184
- term of office of, 176
- vacancy in the office of, 177
- veto over Union legislation, 186
- veto power, 186-87
  - executive veto, 187
  - nature of, 186
  - position in India, 187-89
- whether a member can become, 178

Presidential and Vice-Presidential Elections Act, 1952, 36

President's & Emoluments and Pension (Amendment) Act, 1998, 177

President's rule, 361-66

Press:
- censorship, 108
- freedoms of the, 106
- new law of, 1976, 107

Preventive Detention:
- and punitive detention, 115
- history of, in India, 115
- 44th amendment of, 117
- legislative power with respect to, 115-17
- nature of, 115
- what is to be communicated to detenu, 115

Procedure established by law, 111

Property:
- right to, 126

Prime Minister:
- appointment of, 196
- channel of communication between Ministers and President, 205
- special position of, 198

Private Property, 126

Privileges of Parliament, 218-21

Procedure for reorganisation of States, 71

Prohibition, writ of:
- not available against an administrative officer, 137
- when issued, 137

Proclamation of Emergency, 330, 333, 358
- effects of, 359
- effects of the 42nd and 44th Amendments, 357-58
- of failure of constitutional machinery in a State, 331, 361
- of financial emergency, 333, 366
- suspension of fundamental rights during, 141
- uses of the power of, 363

'Propagation' and conversion, 121

Property:
- modes of acquisition by the Government, 371
- of the Union and the States, 371

Proportional representation why not adopted for House of the People and Legislative Assembly, 213

Protection: in respect of conviction—
- against arbitrary arrest and detention, 114
- for offences, 109
- of life and personal liberty, 111

Protection of Civil Rights Act, 1955, 36

Provincial Autonomy, 9

- **Provinces:**
  - dyarchy in, 6
  - relaxation of control over, 6
- **Public Accounts Committee, 229**
- **Public employment:**
  - equality of opportunity in matters of, 95
- **Public interest litigation : 321**
- **Public Service Commission, 386**
  - appointment and term of office of members of, 386
  - functions of, 388
  - independence of the, 388

Q

- **'Quit India', campaign, 15**
- **Quo Warranto, writ of, 139-40**

R

- **Rajya Sabha, 211-14**
- **'Reasonable opportunity', against dismissal, 383**
- **'Reasonable' restriction:**
  - meaning of, 101
  - substantive and procedural standpoints, 91-92
  - test is objective, 91
- **Reasonableness of a restriction:**
  - tests of, 105
- **'Reduction in rank', 383**
- **Religious denomination:**
  - meaning of, 120
  - right to manage affairs, 119
  - right to own property, 126
- **Religion, freedom of, 119**
- **Religious Institutions, Hindu, 119-20**
- **Remedies, constitution, 131**
  - limitations upon, 132-33
- **'Removal', 383**
- **Reorganisation of States, 49**
  - procedure for, 71
- **Representative Democracy, 23**
- **'Republic'', 21**
- **'Republic Day', 13**
- **Republic of Ireland Act, 1948, 22**
- **Reservation:**
  - of posts, 96
  - of seats, 404
- **Reserved subject, 6**
- **Residuary powers, 329**
- **Right to property, 126**
  - a history of the, under the constitution of India, 126
  - vestiges of the, and comments thereon, 129
- **Rights:**
  - following from other provisions, 83

S

- **Sales Tax : 336**
- **Sadar-i-Riyasat, 266**
- **Scheduled Areas, 293**
  - administration of, 293
- **Scheduled Castes and Tribes:**
  - special provisions for, 402
  - provisions for upliftment of, 402
- **Scheduled Tribes, 402**
- **Schedules of the Constitution:**
  - first schedule, 72
  - fifth schedule, 293
  - sixth schedule, 73
  - seventh schedule, 114, 331
  - eight schedule, 413
  - ninth schedule, 127-28, 160-61
  - tenth schedule, 69
- **Second Chamber:**
  - utility of, in a state, 254
- **Secular State, 21, 27, 118-19**
- **Security of State, 103**
- **Service:**
  - 'dismissal and removal', 383
  - during pleasure of Government, 382
  - effect of 42nd Amendment, 382
  - no dismissal by authority subordinate to appointing authority, 382
  - reasonable opportunity of showing cause, 382
  - 'reduction in rank', 383
- **Sikkim:**
  - a new State, 68
- **Snap vote, 38**
- **Social equality, 42, 97**
- **Socialistic pattern of society, 26**
- **Simon Commission, 8**
- **Sovereignty:**
  - consistent with membership of Commonwealth, 22
  - of Dominion Legislature, 13
- **Socialistic State, 26**
- **Social justice : 25**
- **Sovereign Socialistic Secular Democratic, Republic, 21**
- **Speaker:**
  - casting vote of, 217
  - certifying Money Bill, 217
  - power of, 217
  - presiding over joint sitting, 217
  - termination of office of, 217
- **Special Directives:**
  - relating to languages, 412
- **Special Officer:**
  - for linguistic minorities, 400
  - for Scheduled Caste and Tribes, 402
- **Spoils system:**
  - absence of, 182
- **States:**
  - agreement between, 330
  - control of, by the Union, 342
  - co-ordination between, 353

States—*Contd.*
  delegation of functions between States and Union, 345
  executive powers of, 331-32
  financial powers of, 335
  formation of new, 68
  recognition of public acts of, 352
  representation in the Council of States, 211
  settlement of disputes between, 352
State Executive:
  general structure of, 237
  Governor, 237
  Advocate-General, 245
State Legislature:
  bicameral and unicameral, 247
  Comparison of procedure in Council of States and Legislative Council, 251
  Comparison of procedure in Parliament and, 251
  composition of, 248
  disallowance of legislation, 189
  disqualification for membership of, 249
  duration of, 249
  legislative procedure, 250
  privileges of, 259
  provisions for resolving deadlock in, 251
  qualifications for membership of, 249
  Second Chamber in, 247
  utility of Second Chamber, 254
State rights, 55-59
Statutes [see also 'Govt. of India Acts']
  Acquired Territories (Merger) Act, 1960, 71
  Additional Duties of Excise (Goods of Special Importance) Act, 1957, 337
  Administrative Tribunals Act, 1985, 385
  All-India Services Act, 1951, 381
  All India Service (Amendment) Act, 1963, 394
  Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959, 71
  Andhra State Act, 1953, 71, 260
  Assam (Alteration of Boundaries) Act, 1951, 71
  Assam Reorganisation (Meghalaya) Act, 1969, 72
  Bihar and West Bengal (Transfer of Territories) Act, 1956, 71
  Bombay Reorganisation Act, 1960, 71, 260
  Coal Bearing Areas (Acquisition and Development) Act, 1957, 307
  Comptroller and Auditor-General's (Duties Powers and Conditions of Service) Act, 1971, 204
  Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, 116-17
  Contingency Fund of India Act, 1950, 230

Statutes—*Contd.*
  Council of States (Term of Office of Members) Order, 1952, 214
  Delimitation Commission Acts, 1962, 1972, 395
  East Punjab Public Safety Act, 1949, 108
  Essential Commodities Act, 1955, 355
  Estate Duty Act, 1953, 330
  Finance Commission (Miscellaneous Provision) Act, 1951, 339
  Himachal Pradesh Act, 1970, 260
  Himachal Pradesh and Bilaspur (New State) Act, 1954, 71
  Indian Independence Act, 1947, 12, 13, 17, 46
  Industrial Disputes Act, 1947, 332
  Inter-State Water Disputes Act, 1956, 354
  Kerala Education Bill, 1957, 160
  Lakshadweep Act, 1973, 73
  Land Acquisition Act, 1894, 332
  Madras State (Alteration of Name) Act, 1968, 73
  North-Eastern Areas (Reorganisation) Act, 1971, 260
  Presidential and Vice-Presidential Elections Act, 1952, 36
  President's Emoluments and Pension (Amendment) Act, 1998, 177
  Press (Objectionable Matter) Act, 1951, 107
  Prevention of Publication of Objectionable Matter Act, 1976, 107-08
  Preventive Detention Act, 1950, 117
  Protection of Civil Rights Act, 1955, 36, 49
  Public Employment (Recruitment as to Residence) Act, 1957, 77
  Publication of Objectionable Matter (Repeal) Act, 1977, 107-08
  Punjab Legislative Council (Abolition) Act, 1969, 261
  Punjab Reorganisation Act, 1966, 72, 260
  Punjab Special Powers (Press) Act, 1956, 107, 108
  Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959, 71
  Representation of the People Act, 1950, 395
  Representation of People Act, 1951, 395
  River Boards Act, 1956, 354
  Salaries, Allowances and Pension of Members of Parliament Act, 1954, 216
  Salaries and Allowances of Ministers Act, 1952, 197
  Scheduled Areas Order, 1950, 293
  State of Himachal Pradesh Act, 1970, 72, 277
  State of Nagaland Act, 1962, 72, 260
  State Reorganisation Act, 1956, 71, 260, 275

G.M. College of Education
Jammu.
Acc. No. 8037

Statutes—*Contd.*
- Supreme Court (Number of Judges) Acts, 1956, 1960, 1977, 312
- Union Territories Act, 1963, 276
- Untouchability (Offences) Act, 1955, 49, 96
- Water Disputes Act, 1956, 354
- West Bengal Legislative Council (Abolition) Act, 1969, 261

Structure of Government:
- (A) Union:
  - Executive, 175
  - Legislature, 210
  - Judiciary, 299
- (B) States:
  - Executive, 237
  - Legislature, 247
  - Judiciary, 314
- (C) Union Territories, 275

Suability of heads of State, 373

Supreme Court:
- advisory jurisdiction of, 310
- appellate jurisdiction, 308
- as a Court of Appeal, 305
- as guardian of Constitution, 306
- as guardians of Fundamental Rights, 133-34
- criminal jurisdiction of, 308
- constitution of, 301
- exclusive jurisdiction, 307
- functions as Federal Court, 305
- impact of the 42nd, 43rd, 44th Amendments, upon the, 311
- independence of, 303
- Judges:
- appointment of, 302
- jurisdictions, as compared with High Courts, to issue writs, 321
- miscellaneous jurisdiction, 311
- original jurisdiction of, 306
- position of, as compared with that of American Supreme Court, 304
- position of, under the Constitution, 304
- qualifications for appointment of—
- judges of, 303
- salaries of, 303
- special features of the jurisdiction under Art. 32, 132
- special leave appeal, 309
- tenure of, 303
- writ jurisdiction of, 307

Suzerainty, 46, 47

T

TABLES, 447-494
- **Allocation of Seats in the House of People, 474**
- **Constitution Amendment Acts:**
  - date of assent and commencement of, 451-64
  - amendments made under, 451-64
- **Constituent Assembly of India:**
  - Statewise membership of, 448
  - in Indian States, 448
  - in provinces, 448
- **Directive Principles of State Policy:**
  - directives in the nature of ideals of the State, 467
  - directives shaping the policy of the State, 467
  - non-justiciable rights of citizens, 467
- **Distribution of Legislative Powers:**
  - List I — Union list, 481-90
  - List II — State list, 481-86
  - List III — Concurrent list, 481-85
- **Fundamental Rights:**
  - cultural educational rights of minorities, 466
  - right against exploitation, 466
  - right to constitutional remedies, 466
  - right to equality, 466
  - right to freedom of religion, 466
  - right to particular freedoms, 466
  - right to property, 466
- **Fundamental Duties of citizens, 468**
- **Government of the Union:**
  - Council of ministers, 469
  - President, 469
  - Parliament:
  - Lok Sabha, 469
  - Rajya Sabha, 469
- **Government of States:**
  - Council of Ministers, 476
  - Governor, 476
  - High Courts and their territorial jurisdictions, 479
  - Legislature, 476
- **India:**
  - amendments of, 447
  - area of, 447
  - constituent assembly, 447
  - constitution of, adoption of, 447
  - defence expenditure, 447
  - draft constitution of, 447
  - election, electors and electoral roll in, 447
  - literacy in, 447
  - per capita annual income in, 447
  - population of, 447
  - village in, 447
- **Judiciary:**
  - District Judge's Courts, 478
  - High Court, 478
  - Judicial Magistrates, 478
  - Magistrates Courts, 478
  - Metropolitan Courts, 478
  - Nyaya Panchayats, 478

G.M. College of Education
Raipur, Bantalab
Jammu.
Acc. No. 8039
Dated 8.12.08

Judiciary—*Contd.*
  Panchayat Adalats, 478
  Supreme Court, 478
Languages:
  Assamese, 491
  Bengali, 491
  Gujarati, 491
  Hindi, 491
  Kannada, 491
  Kashmiri, 491
  Konkani, 491
  Malayalam, 491
  Manipuri, 491
  Marathi, 491
  Nepali, 491
  Oriya, 491
  Punjabi, 491
  Sanskrit, 491
  Sindhi, 491
  Tamil, 491
  Telugu, 491
  Urdu, 491
Lok Sabha and its Speaker(s), 475
Membership of Legislative Assemblies and Legislative Councils, 477
Minority :
  Determination of, 124-25
Offices of the President and Vice-President, compared, 470
Presidents and Vice-Presidents of India, past and present, 471
President's Rule in States and Union Territories, 492-94
Prime Ministers of India, past and present, 472
Representation of States and Union territories in the Council of States, 473
Relative scope of Arts. 14, 15 and 16, 98
Territorial Jurisdiction of Bench of Central Administrative Tribunal, 480
Territory of India:
  After 7th Amendment, 1956, 449
  as in original Constitution 1949:
  other territories as may be acquired, 449
  States, 449
  States in Part A, 449
  States in Part B, 449
  States in Part C, 449
  Territories in Part D, 449
  Union territories, 449
Taxation:
  Exemption of Union and State properties from mutual taxation, 337, 350
Tax on sale or purchase:
  restrictions upon power to impose, 336
Tax on professions, 336
Tax on consumption or sale of electricity, 337
Taxes:
  belonging to the States, 338
  belonging to the Union, 338
  levied and collected by Union, but assigned to States where they are leviable, 338
  levied and collected by Union but distributed between Union and States, 338
  levied by the Union but collected and appropriated by, 338
Temporary provisions, 405
Territory:
  alteration of, 70-72
  impact of 35th and 36th Amendments, 68-69
  of India, 67
  of the Union, 67
Titles:
  abolition of, 99-100
Traffic in human beings and forced labour, prohibition of, 118
Trade and Commerce, freedom of, 355
Transferred subjects, 6

U

Union:
  assumption of State Legislative power by, 330-31
  borrowing powers of, 342
  executive powers of, 331
  name of the, 67
  nature of the, 327
  territorial extent of legislation, 328
  territory of the, of India, 67
Union of India:
  distribution of Legislative powers between, and units, 327-29
  Units of, 67
Union of South Africa Act, 1909, 51
Union Territories: 67, 275
  acquired territories, 277
  Administrator for, 276
  genesis of, 275
  High Courts for, 277
  legislative powers, with respect to, 276-277
  President's power to make regulations with respect to, 277
  provision for Legislative Assembly and Council of Ministers of, 276
Union control:
  in normal times, 59
Untouchability, abolition of, 98
Universal Franchise without communal representation, 43

V

Veto, 186-87

Vice-President:
- doubts and disputes relating to election of, 179
- election of, 178
- emoluments of, 179
- functions of, 178
- qualifications for, 178
- term of office of, 178
- whether a member can become, 178

Votable and non-votable expenditure, 226

W

War, power to declare, 183

Welfare States, 24

Writs:
- certiorari, 138
- habeas corpus, 135
- mandamus, 136
- prerogative, 133
- prohibition, 137
- scope of the, 135
- Quo warranto, 139

Working of the Constitution:
- a case for revision of the Constitution, 416
- dangerous anti-national trends in minority demands, 426-30
- financial inadequacy in States, 424
- implementation of Directive Principles, 418
- Judicial Review, 424
- lack of national sentiment, 434
- multiple amendments, 415
- novel trends in judicial review, 426
- separatist forces at work, 420
- To codify:
  - conventions, 417
  - privileges of Legislatures, 417
- trends towards unitarism, 419-20
- vital changes made by 42nd to 44th Amendments, 416

Z

Zonal councils, 353

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About the Book

A book for everybody in India and abroad who wants to know anything about the Constitution of India during its first fifty years. Meets the requirements of the various Universities of India for the LL.B., LL.M., B.A. and M.A. (Political Science) and Competitive examinations held by the Union and State Public Service Commissions. Also indispensable for politicians, journalists, statesmen and administrative authorities. Prescribed in several Universities even for under-graduate courses in Civics. Incorporates all amendments to the Constitution upto 83rd Constitutional Amendment Act 2000. Contains materials, figures and charts not included in any publication so far on the subject. Elaborate comments on separatism in Punjab, Assam & elsewhere.

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